CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 120

ERNEST NEWTON KALB AND MARGARET KALB, HIS WIFE, APPELLANTS,

vs.

HENRY FEUERSTEIN AND HELEN FEUERSTEIN, HIS WIFE

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

FILED JUNE 19, 1939.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 120

ERNEST NEWTON KALB AND MARGARET KALB, HIS WIFE, APPELLANTS,

vs.

HENRY FEUERSTEIN AND HELEN FEUERSTEIN, HIS WIFE

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 30, 1939.

—4295

[fols. 1-4]

IN CIRCUIT COURT OF WALWORTH COUNTY, STATE OF WISCONSIN

ERNEST NEWTON KALB and MARGARET KALB, Plaintiffs,

vs.

HENRY FEUERSTEIN and HELEN FEUERSTEIN, his wife, Defendants

COMPLAINT—Filed Sept. 10, 1937

And now comes the above named plaintiffs and by their attorney J. J. McManamy, alleges and shows to the court:

That they are residents of Walworth County, Wisconsin, and have resided in said county for a great many years prior to the commencement of this action.

That the defendants are residents of the same county.

That at and during all of the time and times herein mentioned the plaintiffs were the owners of and were in possession of certain real estate, and that the premises consisted of a farm of 120 acres, part of which constituted the homestead of the plaintiffs, said real estate being described as follows:

The northwest quarter of the northwest quarter and the north half of the southwest quarter of the northwest quarter of Section Fourteen (14) and the northeast quarter of the northeast quarter and the north half of the southeast quarter of the northeast quarter of Section Fifteen (15), all in Town One (1), North, Range Fifteen (15) East, Walworth County, Wisconsin.

That sometime prior to March 7, 1933, these plaintiffs executed and delivered to the defendants a certain mortgage describing the said real estate to secure the payment of a loan and that on or about March 7, 1933, the defendants herein commenced an action in the County Court of Walworth County, for the foreclosure of the said mortgage. That judgment of foreclosure was entered on the 21st day of April, 1933, in that court.

That by act of the Congress of the United States Section 75 of an act of Congress entitled "An Act to Establish [fol. 5] a Uniform System of Bankruptcy throughout the

United States", approved July 1, 1898, as amended, was further amended on August 28, 1935, 49 Statutes at Large, 943, Chap 792, such amendment being popularly known as the New Frazier-Lemke Act. That on the 2nd day of October, 1934, the plaintiff Ernest Newton Kalb invoked in his behalf the provisions of section 75 of the Bankruptcy Act, as amended, by filing in the District Court of the United States for the Eastern District of Wisconsin his petition and schedules; and on the same day order was made by the Court approving the petition as properly filed as provided by law, and thereafter certain proceedings were had on the plaintiffs behalf in said matter; that on June 27, 1935, an order was entered by the District Court of the United States for the Eastern District of Wisconsin dismissing the plaintiffs petition.

That on the 6th day of September, 1935, in the District Court of the United States for the Eastern District of Wisconsin an order was made reinstating the plaintiffs petition filed in said court on the 2nd day of October, 1934, and vacating the order made in said cause on the 27th day of June, 1935, and on the 9th day of September, 1935, a certified copy of the said order of the District Court of the United States for the Eastern District of Wisconsin, was filed in County Court of Walworth County, Wisconsin.

That on the 20th day of July, 1935, a sheriffs sale of the premises hereinbefore described was had under the judgment of foreclosure of the mortgage hereinbefore referred to, and thereafter the defendants herein gave notice to the plaintiffs that on the 9th day of September, 1935, they would apply to the County Court for Walworth County for an order confirming the sheriffs report of sale of the premises hereinbefore described.

That although on the 16th day of September, 1935, the District Court of the United States for the Eastern Dis-[fol. 6] trict of Wisconsin had exclusive jurisdiction of the person of the plaintiffs and of all of their property, both real and personal, for the purpose of carrying out the provisions of the act of Congress hereinbefore referred to, and exclusive jurisdiction of all judicial or official proceedings in any court under the direction of any official and of all creditors, public and private, and to all of the debtors property wherever located, Roscoe R. Luce, Judge of the County Court of Walworth County, did, on the 16th day of September, 1935, arbitrarily and capriciously sign an instru-

ment purporting to confirm the sheriffs report of sale had on the 20th day of July, 1935, of the premises hereinbefore described, such report setting forth that said premises had been sold to the defendants Henry Feuerstein and Helen Feuerstein. That thereafter one George O'Brien arbitrarily and capriciously executed and delivered to these defendants an instrument in the form of a sheriffs deed of sale on foreclosure, such deed is recorded in the office of the Register of Deeds for Walworth County, Wisconsin, in Vol. 240 of Deeds, page 464.

That on the 16th day of December, 1935, the said Roscoe R. Luce arbitrarily and capriciously signed an instrument which he designated "Order for Writ of Assistance", such instrument purporting to direct the Clerk of the County Court of Walworth County to issue a writ of assistance, and that on the 16th day of December, 1935, one Henry D. Dunbar, as clerk of said court, arbitrarily and capriciously signed an instrument purporting to be a writ of assistance and such instrument was delivered to one George O'Brien, as sheriff of said county, purporting to direct him to remove the plaintiffs herein from the above described premises, and dispossess them thereof, and thereafter the said George O'Brien, his agents, servants and employees, entered upon the premises of the plaintiff hereinbefore described, and by force removed the plaintiffs and their family, together with all of their personal property therefrom, and did actually place in possession of said premises the defendants herein, [fol. 7] and that the said defendants have been in possession of said premises from the 12th day of March, 1936, and refuse to deliver possession of said premises to the plaintiffs herein.

That on the 6th day of September, 1935, and at all times thereafter mentioned, the petition of the plaintiff, Ernest Newton Kalb, under Section 75 of the Act of Congress to establish a uniform system of Bankruptcy throughout the United States, was pending in the District Court of the United States for the Eastern District of Wisconsin.

These plaintiffs allege that on the 16th day of September, 1935, the County Court for Walworth County and Roscoe R. Luce, as Judge thereof, had no jurisdiction of the person of the plaintiffs or any of their property, real or personal. That exclusive jurisdiction thereof was vested in the District Court of the United States for the Eastern District of Wisconsin, and that the instrument signed by Roscoe R.

Luce September 16, 1935, purporting to confirm the sheriffs report of sale, is wholly void, and that the instrument signed by George O'Brien, as sheriff, purporting to be a deed of the premises, is void, and that the instrument signed on the 16th day of December, 1935, purporting to direct the Clerk of the said county Court to issue a writ of assistance is wholly void, and that the instrument signed by the Clerk of said Court on the 16th day of December, 1935, purporting to direct the sheriff of Walworth County to remove the plaintiffs from the said premises and dispossess them thereof is wholly void, and the acts of George O'Brien, sheriff for said county, on the 12th day of March, 1936, was unlawful and wrongful, and that his acts in placing the defendants in possession of said premises is unlawful and that the defendants have wrongfully and unlawfully beein in possession of said premises from said date without any right or title thereto.

Wherefore, these plaintiffs demand judgment:

(a) That the instrument executed by George O'Brien as sheriff for Walworth County, and recorded in the office of [fol. 8] the Register of Deeds for said County in Vol. 240 of Deeds, page 464, be cancelled and expunged from the records of said office.

(b) That the defendants Henry Feuerstein and Helen Feuerstein be removed from said premises.

(c) That the plaintiffs herein be placed in possession thereof.

(d) That the plaintiffs have their costs and disbursements herein.

J. J. McManamy, Plaintiff's Attorney, 1 West Main Street, Madison, Wisconsin.

Duly sworn to by Ernest Newton Kalb. Jurat omitted in printing.

[fol. 9] [File endorsement omitted.]

[fol. 10] In Circuit Court of Walworth County

[Title omitted]

Demurrer—Filed Sept. 22, 1937

Now comes the above named defendants, Henry Feuerstein and Helen Feuerstein, his wife, by Moran & O'Brien,

their attorneys, and demur to the complaint of the plaintiffs in the above entitled action, and specify as grounds of objection thereto—

That it appears from the face of said complaint that the same does not state facts sufficient to constitute a cause of action.

Moran & O'Brien, Attorneys for Defendants, Henry Feuerstein and Helen Feuerstein, his wife.

Dated September 17, 1937.

[fol. 11] [File endorsement omitted.]

Service admitted Sept. 18, 1937. J. J. McManamy, Attorney for Plaintiff.

[fol. 12] In Circuit Court of Walworth County

[Title omitted]

Notice of Hearing—Filed Oct. 28, 1937

Please take notice that the issues raised by the demurrer in the above entitled action will be brought on for trial before the Court at the Court House in the city of Elkhorn, Walworth County, Wisconsin, on the 1st day of November, 1937, at 10:00 o'clock in the forenoon, or as soon thereafter as counsel can be heard.

J. J. McManamy.

To: Moran and O'Brien, Delavan, Wisconsin, Attorneys for the Defendants.

Service admitted this 16th day of October, 1937. Moran & O'Brien, Attys. for Defendants.

[fol. 13] [File endorsement omitted.]

[fol. 14] In Circuit Court of Walworth County

[Title omitted]

Order Sustaining Demurrer—Filed December 20, 1937

The above entitled action having been brought on for trial upon the issues of law joined herein; and after reading and

filing the brief of Moran and O'Brien, attorneys for the defendants, and the briefs of J. J. McManamy attorney for the plaintiffs; and both of the parties hereto having waived oral argument in said matter;

On Motion of Moran & O'Brien, attorneys for the defendants,

Now, Therefore, It Is Ordered, that said demurrer be sustained, and that the defendants have judgment thereon, but with leave to the plaintiffs to amend the complaint within twenty days from the date of service of this order, upon payment of the sum of Ten ($10.00) Dollars, costs.

Dated December 17th, 1937.

By the Court:

Edgar V. Werner, Judge.

[fols. 15-16] [File endorsement omitted.]

[fols. 17-18] In Supreme Court of Wisconsin

Walworth Circuit Court

Ernest Newton Kalb and Margaret Kalb, Appellants,

vs.

Henry Feuerstein and Helen Feuerstein, his Wife, Respondents

Opinion by Chief Justice Rosenberry

Judgment—May 17, 1938

This cause came on to be heard on appeal from the order of the Circuit Court of Walworth County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the order of the Circuit Court of Walworth County appealed from in this cause, be, and the same is hereby, affirmed with costs against the said appellants taxed at the sum of Sixty-three and 04/100 ($63.04) Dollars.

[fol. 19] [File endorsement omitted]

IN SUPREME COURT OF WISCONSIN

No. 104. January Term, 1938

ERNEST NEWTON-KALB et al., Appellants,

vs.

HENRY FEUERSTEIN et al., Respondents

Appeal from an order of the circuit court for Walworth county: Edgar V. Werner, Circuit Judge. Affirmed.

This action was begun on September 1, 1937, by Ernest Newton Kalb and Margaret Kalb, plaintiffs, against Henry Feuerstein and Helen Feuerstein, his wife, to expunge from the records of the office of the register of deeds of Walworth County, a deed executed by George O'Brien as sheriff to the defendants and for the removal of the defendants from the premises and putting the plaintiffs in possession thereof. From the order sustaining the demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, entered on December 17, 1937, the plaintiffs appeal.

[fols. 20-21] OPINION—Filed May 17, 1938

ROSENBERRY, C. J.

The question sought to be raised in this case is the same question dealth within a companion case, Ernest Newton Kalb, Appellant, v. Roscoe R. Luce et al., Respondents, decided herewith, and for the reasons there stated the order sustaining the demurrer to the complaint should be affirmed.

By the Court: The order appealed from is affirmed.

[fols. 22-23] IN SUPREME COURT OF WISCONSIN

[Title omitted]

MOTION FOR REHEARING—Filed June 2, 1938

The appellant moves for a rehearing in this case on the only question discussed in the opinion of the Court.

Dated: June 2, 1938.

J. J. McManamy, Attorney for Appellants.

[File endorsement omitted.]

[fols. 24-25] IN SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER DENYING REHEARING—June 29, 1938

The Court being now sufficiently advised of and concerning the motion of the said appellants for a rehearing in this cause, it is now here ordered that said motion be, and the same is hereby, denied without costs.

[fols. 26-42] IN SUPREME COURT OF WISCONSIN

[Title omitted]

[File endorsement omitted.]

OPINION—Filed June 27, 1938

Rosenberry, C. J. On motion for rehearing. The memorandum in Number 105, Ernest Newton Kalb, Appellant, v. Roscoe R. Luce et al., Respondents, decided herewith, covers both cases and for the reasons stated in Number 105, the motion for rehearing is denied.

By the Court.—Motion for rehearing is denied without costs.

[fol. 2] IN CIRCUIT COURT OF WALWORTH COUNTY

[Title omitted]

NOTICE OF APPEAL—Filed in Supreme Court, February 11, 1939

Please Take Notice That the plaintiff, Ernest Newton Kalb, above named, hereby appeals to the Supreme Court of the State of Wisconsin from a judgment rendered by the above named Court herein, entered on the 31st day of December, 1938, in favor of the defendants and against the plaintiff dismissing the plaintiff's complaint and directing costs be assessed against the plaintiff and from the whole of such judgment.

Dated this 24th day of January, 1939.

J. J. McManamy, Plaintiffs' Attorney.

To: Moran & O'Brien, Attorneys for Henry Feuerstein and Helen Feuerstein.

To: Harry Dunbar, Clerk Circuit Court, Walworth County, Wisconsin.

[File endorsement omitted.]

[fol. 3] Bond on appeal for $250.00, filed Feb. 11, 1939, omitted in printing.

[fols. 4-5] Affidavits of service of notice and bond omitted in printing.

[fol. 6] Harry D. Dunbar, Filed Jan. 27, 1939. Clerk of Courts.

[fol. 7] IN CIRCUIT COURT OF WALWORTH COUNTY

[Title omitted]

AFFIDAVIT OF DEFAULT—Filed January 3, 1939

STATE OF WISCONSIN,
County of Walworth, ss:

J. Arthur Moran, being first duly sworn, on oath, says that he is one of the attorneys for the defendants in the above entitled action; that although an order was entered on the 17th day of December, A. D., 1937, granting leave to the plaintiffs to amend their complaint within twenty days from the date of service of such order, no such amended complaint has been served upon the defendants or their attorneys, and that the said plaintiffs are now in default under said order; and that this affidavit is made for the purpose of showing cause why the plaintiffs' complaint should be dismissed with costs to the defendants.

J. Arthur Moran.

Subscribed and Sworn to before me this 29th day of December, 1938. Beth A. Strong, Notary Public, Walworth County, Wis. (Seal.)

[fol. 8] [File endorsement omitted.]

[fol. 9] IN CIRCUIT COURT OF WALWORTH COUNTY

ERNEST NEWTON KALB and MARGARET KALB, Plaintiffs,

vs.

HENRY FEUERSTEIN and HELEN FEUERSTEIN, his wife, Defendants

JUDGMENT—Filed January 3, 1939

An order having been entered in this action on the 17th day of December, A. D., 1937, sustaining a demurrer to the complaint herein and giving the said plaintiffs leave to amend their complaint within twenty days after service of such order and upon payment of the sum of Ten ($10.00) Dollars, costs; and a copy of said order having been served upon J. J. McManamy, attorney for the plaintiffs, on the 20th day of December, 1937, and more than twenty days having elapsed since such service and the plaintiffs having failed to amend their complaint;

Now, Therefore, On Motion of Moran & O'Brien, attorneys for the defendants,

[fol. 10] It is Ordered and Adjudged, that the complaint herein be, and the same is hereby dismissed, and the defendants do have and recover costs of the said plaintiffs, taxed at One Hundred Five and 45/100 ($105.45) Dollars.

Dated this 31st day of December, 1938.

By the Court:

Edgar V. Werner, Circuit Judge.

[fol. 11] [File endorsement omitted.]

[fol. 12] IN CIRCUIT COURT OF WALWORTH COUNTY

[Title omitted]

NOTICE OF ENTRY OF JUDGMENT—Filed Jan. 12, 1939

To J. J. McManamy, Attorney at Law, Madison, Wisconsin.

SIR:

You Are Hereby Notified, that on the 31st day of December, 1938, judgment was duly entered in the above entitled matter, and that on the 7th day of January, 1939,

the costs were therein taxed and duly inserted in the judgment, a copy of said judgment being attached hereto and made a part of this notice.

Dated this 9th day of January, 1939.

Moran & O'Brien, Defendants' Attorneys.

Service admitted January 10, 1939.

J. J. McManamy, Attorney for Plaintiff.

[fols. 13-14] Judgment omitted. Printed side page 9 ante.

[fol. 15] [File endorsement omitted.]

[fol. 16] In Supreme Court of Wisconsin

[File endorsement omitted]

Ernest Newton Kalb and Margaret Kalb, Appellants,

vs.

Henry Feuerstein and Helen Feuerstein, his wife, Respondents

Notice of Motion to Advance—Filed March 25, 1939

Please Take Notice that on the 11th day of April, 1939, at the opening of Court on that day or as soon thereafter as counsel can be heard the appellants will move for an order:

(a) To advance the cause on the calendar, and

(b) That the cause may be decided by the Court without the filing of printed case and without further notice to the parties.

Dated this 20th day of March, 1939.

James J. McManamy, Attorney for Appellants.

To Moran & O'Brien, Attorneys for Respondents Henry Feuerstein and Helen Feuerstein.

Admission of Service admitted this 22nd day of March, 1939.

Moran & O'Brien, Attorneys for Respondents.

[fol. 17] [Title omitted]

AFFIDAVIT OF JAMES J. McMANAMY

STATE OF WISCONSIN,
County of Dane, ss:

James J. McManamy, being first duly sworn says, that he is the attorney for the appellants in this action and makes this affidavit in their behalf. That this cause was before this Court on April 12, 1938, on an appeal from an order sustaining a demurrer to the complaint and the appeal was decided by this Court on June 29, 1938 (228 Wis. 519) affirming the order sustaining the demurrer.

That thereafter an appeal was taken to the Supreme Court of the United States from the judgment of this Court. That the appeal was dismissed because final judgment had not been entered by the trial court.

That thereafter the record was remitted to the Circuit Court for Walworth County and judgment dismissing the complaint was entered in that Court.

That an appeal from the judgment so dismissing the complaint is now pending in this Court and the appellant is desirous of having the matter determined by this Court at the earliest date possible, and by his attorney James J. [fols. 18-19] McManamy makes this affidavit bringing these facts to the attention of the Court to the end:

(a) An order may be made advancing said cause on the calendar, and

(b) that the cause may be decided by this Court without the filing of printed case and without further notice to the parties.

James J. McManamy.

Subscribed and sworn to before me this 20 day of March, 1939. Mabel Graves, Notary Public, Dane County, Wis. (Seal.)

[fol. 20] IN SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER DENYING MOTION TO AMEND FORMER OPINION—April 11, 1939

And now at this day came the said respondents, by their attorney, and moved the court now here to amend the former

opinion by deciding two additional questions, which motion having been argued by J. Arthur Moran, Esq., for the said respondents, and by J. J. McManamy, Esq., for the said appellant, and submitted, and the court being now sufficiently advised of and concerning the said motion, it is now here ordered that said motion be, and the same is hereby, denied.

[fol. 21] IN SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER GRANTING MOTION FOR JUDGMENT ETC.—April 11, 1939

And now at this day came the said appellant, by his attorney, and moved the court now here to place this cause on the calendar and assign same for argument on the May call, and without printed case and briefs, and for judgment on the record, which motion having been argued by J. J. McManamy, Esq., for the said appellant, and by J. Arthur Moran, Esq., for the said respondents, and submitted, and the court being now sufficiently advised of and concerning the said motion, it is now here ordered that the motion for judgment on the record, be, and the same is hereby granted.

[fols. 22-23] IN SUPREME COURT OF WISCONSIN

Walworth Circuit Court. Opinion Per Curiam

ERNEST NEWTON KALB, Appellant,
MARGARET KALB, Plaintiff,

vs.

HENRY FEUERSTEIN and HELEN FEUERSTEIN, his wife,
Respondents

JUDGMENT—April 20, 1939

This cause came on to be heard on appeal from the judgment of the Circuit Court of Walworth County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Walworth County, in this cause,

be, and the same is hereby, affirmed with costs against the said appellant taxed at the sum of Twenty-eight and 50/100 ($28.50) Dollars.

[fol. 24] [File endorsement omitted]

IN SUPREME COURT OF WISCONSIN, JANUARY TERM, 1939

ERNEST NEWTON KALB, Appellant,

vs.

HENRY FEUERSTEIN ET AL., Respondents.

Appeal from a judgment of the circuit court for Walworth county: Edgar V. Werner, Circuit Judge. Affirmed.

This case was here upon a former appeal which was from an order sustaining a demurrer. The Supreme Court of the United States having declined to review the determination of this Court because it was not final, the record was remitted to the trial court. There such proceedings were had that a final judgment dismissing the plaintiff's complaint was entered on December 31, 1938. From that judgment the plaintiff appeals.

[fol. 25] OPINION—Filed April 20, 1939

By the Court.—The issues raised upon this appeal were considered by this Court in Kalb v. Feuerstein (1938), 228 Wis. 525, 279 N. W. 687. For the reasons there stated as grounds for sustaining the demurrer to the complaint, the judgment of the court dismissing the complaint should be affirmed.

The judgment appealed from is affirmed.

[fol. 26] [File endorsement omitted]

IN SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER ALLOWING APPEAL—Filed May 19, 1939

The petition of Ernest Newton Kalb, appellant, in the above entitled matter, for an appeal therein to the Supreme Court of the United States from the Supreme Court of the

State of Wisconsin, and the Assignment of Errors filed herewith and the record of said cause having been considered:

It Is Ordered: That an appeal be and is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of Wisconsin as prayed in said petition and the Clerk of the Supreme Court of the State of Wisconsin shall prepare and certify a transcript of the records and proceedings in the above entitled cause as shall be designated by precipe of the parties and transmit the same to the Supreme Court of the United States within thirty days from date hereof.

It Is Further Ordered: That the appellant will execute his undertaking in the sum of five hundred Dollars conditioned that he shall prosecute said appeal to effect and if appellant shall fail to make his plea good, to answer all damages and costs of the respondents.

It Is Further Ordered: That the appeal herein shall operate as a supersedeas.

May 19, 1939.

Marvin B. Rosenberry, Chief Justice of the Supreme Court of the State of Wisconsin. (Seal Supreme Court of Wisconsin.)

[fol. 27] IN SUPREME COURT OF WISCONSIN

[Title omitted]

PETITION FOR APPEAL—Filed May 19, 1939

The petitioner, Ernest Newton Kalb, respectfully represents that he is a citizen of the United States and a resident of the State of Wisconsin, and considering himself aggrieved by the final decision of the Supreme Court of the State of Wisconsin in the above entitled cause wherein he is the appellant therein, hereby prays that an appeal be allowed to the Supreme Court of the United States from the decree entered in said cause by the Supreme Court of the State of Wisconsin on the 20th day of April, 1939, by which it affirmed the judgment of the Circuit Court for Walworth County, Wisconsin, dismissing the plaintiffs complaint.

STATEMENT

The case is one in which the validity of the statute of the United States is drawn in question, to-wit, 49 Statutes at

Large 943, Chapter 792, approved August 28, 1935, amending Section 75 (n) of the Bankruptcy Act and known as the new Frazier-Lemke Act wherein the Supreme Court of the State of Wisconsin decided a federal question of substance not theretofore determined by the Supreme Court of the United States. That the part of the said statute under [fol. 28] which the appellant asserts his rights relates to the exclusive jurisdiction of the federal court of the person of the petitioner and all of his property after the filing of his petition pursuant to said act. The appellant asserts that his rights under this statute have been denied because the Supreme Court of the State of Wisconsin has decided that this statute of itself does not effect a stay of proceedings in a mortgage foreclosure pending in a state court at the time the appellant filed his petition under Section 75 (n) of the Bankruptcy Act, thereby drawing in question the validity of a federal statute and deciding in a way probably not in accord with applicable decisions of the Supreme Court of the United States.

Manner in which the Question Arose in the Trial Court

The complaint sets up that the appellant is a farmer, and that on the 2nd day of October, 1934, he filed his petition in the District Court of the United States for the Eastern District of Wisconsin under Section 75 (n) of the Bankruptcy Act as amended, that foreclosure of a mortgage on his farm was pending in a county court at that time. That his petition for relief under the Bankruptcy Act was dismissed on the 27th day of June, 1935. That after the amendment to Section 75 approved August 28, 1935, to-wit, on the 6th day of September, 1935, the appellant's petition was reinstated in the District Court of the United States by order of that court, and on that day a certified copy of such order of reinstatement was served upon the Judge of the County Court in which the mortgage foreclosure was pending. That on the 16th day of September, 1935, the said Judge entered an order in his court confirming a sheriff's report of sale theretofore had in the foreclosure proceedings and directed the delivery of a deed thereunder to the purchaser. The appellant asserts that the County Court was wholly without jurisdiction to confirm the sheriff's report of sale on September 16, 1935, and was without [fols. 29-30] jurisdiction to direct the delivery of a deed by the sheriff and that such order is wholly void.

The defendants interposed a demurrer to the complaint which was sustained by the Circuit Court for Walworth County and the order sustaining the demurrer was affirmed by the Supreme Court of the State of Wisconsin and thereafter the Circuit Court entered a judgment dismissing the complaint and on appeal to the Supreme Court of Wisconsin the judgment dismissing the complaint was affirmed.

Assignment of Error

(a) The court erred in its judgment directing that the order of the Circuit Court for Walworth County sustaining the demurrer be affirmed.

(b) The court erred in affirming the judgment of the Circuit Court dismissing the complaint.

Prayer for Reversal

For which errors the appellant above, Ernest Newton Kalb, prays that the said judgment of the Supreme Court of the State of Wisconsin made on the 20th day of April, 1939, in the above entitled cause be reversed and judgment ordered in favor of this appellant, and that a- authenticated transcript of the proceedings in this court may be transmitted to the Supreme Court of the United States, and that an order be entered fixing the amount of the bond to be required of the appellant in connection with this petition for appeal.

Ernest Newton Kalb, Petitioner.

Duly sworn to by Ernest Newton Kalb. Jurat omitted in printing.

[fols. 31-35] [File endorsement omitted]

[fols. 36-37] Bond on Appeal for $500.00 approved and filed May 25, 1939. Omitted in printing.

[fols. 38-43] Citation in usual form showing service on J. Arthur Moran. Filed May 31, 1939. Omitted in printing.

[fol. 44] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 45-48] SUPREME COURT OF THE UNITED STATES

October Term, 1938

No. 375.

ERNEST NEWTON KALB AND MARGARET KALB, Appellants,

vs.

HENRY FEUERSTEIN AND HELEN FEUERSTEIN

ORDER AS TO RECORD ON FORMER APPEAL—Filed April 29, 1939

On the petition hereto annexed:

It is ordered: That the transcript of the record of the Supreme Court of the State of Wisconsin now on file in this Court may be used by the appellants in so far as the same is applicable on an appeal to this Court from the judgment entered in the Supreme Court of the State of Wisconsin on April 20th, 1939.

Dated this 29 day of April, 1939.

Charles E. Hughes, Chief Justice.

[fol. 48½] [File endorsement omitted.]

[fol. 49] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed June 19, 1939

Comes now the appellant in the above entitled cause and states that the points upon which he intends to reply in this Court in this case are as follows:

Point I. That the Supreme Court of Wisconsin erred in finding and holding:

(a) That the order of the Circuit Court for Walworth County sustaining the demurrer of Henry Feuerstein and Helen Feuerstein to the complaint be affirmed.

Point II. That the Supreme Court of Wisconsin erred in affirming the judgment of the trial court dismissing the plaintiff's complaint.

And the appellant further states that only the following parts of the record, as filed in this Court, need be printed by the Clerk for hearing in this case.

Title of Paper

Plea to Wisconsin Supreme Court.
Affidavit of default to amend complaint.
Judgment dismissing the complaint.
Notice of entry of judgment.
[fol. 50] Notice of appeal to Wisconsin Supreme Court and proof of service.
Undertaking on appeal to Wisconsin Supreme Court and proof of service.
Notice to advance cause to May calendar for decision and affidavit on which motion was made and proof of service.
Order denying defendants motion to modify former opinion.
Order granting motion to advance cause on calendar.
Opinion of Supreme Court of Wisconsin.
Order allowing appeal to United States Supreme Court and petition on which same was made.
Separate statement for jurisdiction.
Citation and proof of service.
Præcipe and proof of service.
Bond on appeal to Supreme Court of the United States.

William Lemke, Fargo, North Dakota, Appellants Attorney. James J. McManamy, Madison, Wisconsin, Appellants Attorney.

[fol. 51] [File endorsement omitted.]

[Endorsed on cover:] Enter William Lemke. File No. 43,527. Wisconsin, Supreme Court. Term No. 120. Ernest Newton Kalb and Margaret Kalb, His Wife, Appellants, vs. Henry Feuerstein and Helen Feuerstein, His Wife. Filed June 19, 1939. Term No. 120 O. T. 1939.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 121

ERNEST NEWTON KALB, APPELLANT,

vs.

ROSCOE R. LUCE, HENRY FEUERSTEIN, HELEN FEUERSTEIN AND GEORGE O'BRIEN

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

FILED JUNE 19, 1939.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 121

ERNEST NEWTON KALB, APPELLANT,

vs.

ROSCOE R. LUCE, HENRY FEUERSTEIN, HELEN FEUERSTEIN AND GEORGE O'BRIEN

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 31, 1939.

—4302

[fols. 1-9]

IN CIRCUIT COURT OF WALWORTH COUNTY, STATE OF WISCONSIN

ERNEST NEWTON KALB, Plaintiff,

vs.

ROSCOE R. LUCE, HENRY FEUERSTEIN, HELEN FEUERSTEIN AND GEORGE O'BRIEN, Defendants

COMPLAINT

The above named plaintiff by his attorney, J. J. McManamy, alleges and shows to the court:

1. That he is a resident of Walworth County, Wisconsin, and has resided in said county for a great many years prior to the commencement of this action.

2. That the defendants all reside in Walworth County, and that at and during all of the time and times herein mentioned the defendant, Roscoe R. Luce, was Judge of the County Court for Walworth County, and the defendant, George O'Brien, was the sheriff of said county.

3. That at and during all of the time and times herein mentioned the plaintiff was the owner of and was in possession of certain real estate, and that the premises consisted of a farm of 120 acres, part of which constituted the homestead of the plaintiff, said real estate being described as follows:

The northwest quarter of the northwest quarter and the north half of the southwest quarter of the northwest quarter of Section Fourteen (14) and the northeast quarter of the northeast quarter and the north half of the southeast quarter of the northeast quarter of section Fifteen (15), all in Town One (1), North, Range Fifteen (15) east, Walworth County, Wisconsin.

4. That prior to March 7, 1933, the plaintiff and his wife, executed and delivered to the defendants, Henry Feuerstein and Helen Feuerstein, as his wife, a certain mortgage describing the said real estate, said mortgage to secure a debt, [fol. 10] and that prior to March 7, 1933, the debt secured

by the mortgage had matured, and on said date the mortgagee commenced an action in the Court- Court of Walworth County for the foreclosure of the mortgage.

5. That judgment of foreclosure was entered in said action on the 21st day of April, 1933.

6. That by act of the Congress of the United States, Section 75 of an act of the Congress entitled—An Act to Establish a Uniform System of Bankruptcy throughout the United States—approved July 1, 1898, as amended, was further amended on August 28, 1935, 49 Statutes at Large, 942-945, Chap. 792, such amendment being popularly known as the New Frazier-Lemke Act.

7. That on the 2nd day of October, 1934, the plaintiff invoked in his behalf the provisions of the Acts of Congress hereinbefore referred to, by filing in the District court of the United States for the Eastern District of Wisconsin, his petition and schedules as provided by law, and that on the said day an order was made and entered by the District Court of the United States for the Eastern District of Wisconsin, approving his petition as properly filed, and that on the same day the matter was referred to the proper officer for further proceedings in said matter in bankruptcy.

8. That thereafter and on the 27th day of June, 1935, an order was entered by the United States District Court for the Eastern District of Wisconsin, dismissing the plaintiffs petition in so far as it related to Sec. 75 hereinbefore mentioned.

9. That on the 6th day of September, 1935, the plaintiff herein petitioned the District Court of the United States for the Eastern District of Wisconsin for an order vacating the order made in that court on the 27th day of June, 1935, and reinstating his petition filed on the 2nd day of October, 1934. That on the 6th day of September, 1935, the Court made and entered an order vacating its order made on the [fol. 11] 27th day of June, 1935, in said matter, and ordered the reinstatement of the plaintiffs petition as filed on October 2, 1934. That on the 6th day of September, 1935, this plaintiff served on the defendant, Roscoe R. Luce, a certified copy of said order, and such certified copy was filed in the County Court for Walworth County on the 9th day of September, 1935, with the papers filed in the foreclosure proceedings hereinbefore mentioned.

10. That on the 20th day of July, 1935, George O'Brien, as sheriff of Walworth County, conducted a sale of the premises hereinbefore described under the judgment of foreclosure and sale, of the mortgage hereinbefore mentioned, and this plaintiff alleges that the sheriffs sale had not been confirmed by the County Court for Walworth County, Wisconsin, on the 6th day of September, 1935.

11. That subsequent to the sheriffs sale notice was given to this plaintiff that the defendants, Henry Feuerstein and Helen Feuerstein, the mortgagees, would apply to the County Court for Walworth County on the 9th day of September, 1935, for an order confirming the sheriffs report of sale, and at a hearing on that motion on that day the defendant, Roscoe R. Luce, deferred making any order on such application, but that thereafter, and on the 16th day of September, 1935, and unknown to this plaintiff, and without further notice to him, the defendant, Roscoe R. Luce, with full knowledge that the plaintiffs petition filed in the District Court of the United States for the Eastern District of Wisconsin on the 2nd day of October, 1934, had been reinstated by order of that Court, and while the exclusive jurisdiction of the person of the plaintiff and of all of his property, both real and personal, was in the United States District Court for the Eastern District of Wisconsin, the defendant, Roscoe R. Luce, on said day, arbitrarily, wrongfully and unlawfully signed an instrument purporting to confirm the sheriffs report of sale of the premises hereinbefore described, made by the said sheriff on the 20th day [fol. 12] of July, 1935, which report set forth that the premises had been sold to Henry Feuerstein and Helen Feuerstein, attempting thereby to confirm the said sale.

12. That thereafter the defendant, George O'Brien wrongfully and unlawfully executed and delivered to the purchasers at the sale an instrument in the form of a sheriffs deed of sale on foreclosure and that such deed was thereafter recorded in the office of the Register of Deeds for Walworth County, Wisconsin, on the 20th day of September, 1935, in Vol. 240 of Deeds, on page 464 thereof.

13. That on the 16th day of December, 1935, the defendants Henry Feuerstein and Helen Feuerstein, wrongfully and unlawfully, filed in the County Court for Walworth County, a petition praying for an order directing the Clerk

of said court to issue a writ of assistance to the sheriff of said county, and on the same day the defendant, Roscoe R. Luce, wrongfully and unlawfully signed an instrument directing the Clerk of that Court to issue the writ as prayed for in the petition of Henry Feuerstein, and on the said day Harry D. Dunbar, who at that time was Clerk of said Court, wrongfully and unlawfully signed and instrument purporting to direct the defendant, George O'Brien, to eject and remove this plaintiff from the premises hereinbefore described, and to eject and remove Margaret Kalb, the plaintiffs wife, and to eject and remove any person who had come into the possession of said premises or any part thereof, under this plaintiff; and to put the defendant Henry Feuerstein, or his assigns, in full, peaceable and quiet possession of said premises without delay, and this plaintiff is informed and believes that said instrument was delivered to the Defendant, George O'Brien, by the attorneys for the defendants, Henry Feuerstein and Helen Feuerstein.

14. That thereafter and on the 12th day of March, 1936, the defendant, George O'Brien, together with divers other [fol. 13] persons, they being his agents, servants and employees, wrongfully and unlawfully went upon the premises of this plaintiff, and with great force and arms broke into the plaintiffs house and home, and they did cruelly beat and abuse this plaintiff in his house and home, and in the presence of his wife and family, and the said George O'Brien, his agents, servants and employees, with great force and arms, forced this plaintiff, his wife, and family, into automobiles and transported them therefrom, and did wrongfully and unlawfully place in possession of said premises the defendants Henry Feuerstein and Helen Feuerstein, and that the said defendants have been in wrongful possession of said premises from the 12th day of March, 1936.

15. This plaintiff is informed and believes that all of the acts of the defendants done and performed by them subsequent to September 6, 1935, were done and performed in collusion, to effect a plan or scheme to acquire possession of the plaintiffs farm, and all such acts done by the defendants subsequent to September 6, 1935, were done and performed while the plaintiffs petition hereinbefore referred to, was pending in the District Court of the United States for the Eastern District of Wisconsin.

16. That the reasonable value of the use and occupation of the premises hereinbefore described from the 12th day of March, 1936, is reasonably worth the sum of Seven Thousand Dollars ($7,000.00).

17. That because of the wrongful and unlawful act of the defendants herein mentioned this plaintiff has been damaged in the amount of Seven Thousand Dollars ($7,000.00).

Second Cause of Action

As and for a separate and for a second cause of action, this plaintiff restates and realleges paragraphs one to fifteen, both inclusive, as set forth in the first cause of action in the plaintiffs complaint, as though all of such allegations [fol. 14] were fully set forth and repeated in this, the plaintiffs second cause of action.

1. This plaintiff alleges that on the 12th day of March, 1936, the defendant, George O'Brien, and divers other persons, wrongfully and unlawfully entered upon the plaintiff's premises hereinbefore described, and in the presence of the plaintiff's wife and family, broke into the dwelling house, and with force and arms did assault and beat and abuse this plaintiff by striking and hitting him, that as a result of such abuse blood flowed from the plaintiff's head, and the said George O'Brien, together with divers other persons, they being his agents, servants and employees, did force this plaintiff and his family out of their home, and did force them into automobiles and remove this plaintiff and his family from the premises hereinbefore described.

2. This plaintiff is informed and believes that the entering upon his premises by George O'Brien, his agents, servants and employees, and assaulting him and beating him, was under the direction of the other defendants in this action, who wrongfully and unlawfully directed the said George O'Brien to make such entry and wrongfully remove the plaintiff and his family therefrom. That because of the wrongful acts of the defendants in directing George O'Brien to enter upon the plaintiff's premises and because of the wrongful and unlawful act of the defendant George O'Brien, his agents, servants and employees, in making such entry and removing the plaintiff and his family therefrom and because of said defendants assaulting and beating this

plaintiff, he has been damaged in the sum of Two Thousand Dollars ($2,000.00).

Third Cause of Action

As and for a separate and for a third cause of action this plaintiff restates and realleges paragraphs one to fif-
[fol. 15] teen, both inclusive, as set forth in the first cause of action in the plaintiff's complaint, as though all of such allegations were fully set forth and repeated in this, the plaintiff's third cause of action.

1. This plaintiff alleges that on the 12th day of March, 1936, the defendant George O'Brien, together with divers other persons, wrongfully and unlawfully restrained this plaintiff of his liberty by taking hold of the plaintiff, and with great force and arms imprisoned him in the County Jail of Walworth County, Wisconsin, wherein the said defendant George O'Brien, by himself, his agents, servants, and employees, by force kept this plaintiff in prison and restrained of his liberty for a considerable period of time.

2. That as a part of such imprisonment the said George O'Brien later, and while still restraining the plaintiff of his liberty, forced the plaintiff to go to the defendant, Roscoe R. Luce, to hear and receive such sentence and abide such direction as said defendant might make and impose on this plaintiff in respect to such confinement and imprisonment.

3. That such confinement and imprisonment was under the direction of the defendants in this action, as this plaintiff is informed and believes.

4. That because of the wrongful acts of the defendants in directing the defendant George O'Brien to arrest this plaintiff and to imprison him, and to restrain him of his liberty the plaintiff has been damaged in the sum of Twenty Thousand Dollars ($20,000.00).

Wherefore, the plaintiff demands judgment:

(a) On the first cause of action in the sum of Seven Thousand Dollars ($7,000.00) damages;

(b) On the second cause of action in the sum of Two Thousand Dollars ($2,000.00) damages;

(c) On the third cause of action in the sum of Twenty Thousand Dollars ($20,000.00) damages;

[fol. 16] (d) And for his costs and disbursements herein.

J. J. McManamy, Plaintiff's Attorney, 1 West Main Street, Madison, Wisconsin.

Duly sworn to by Ernest Newton Kalb. Jurat omitted in printing.

[fol. 17] IN CIRCUIT COURT OF WALWORTH COUNTY

[Title omitted]

DEMURRER OF HENRY FEUERSTEIN AND HELEN FEUERSTEIN—Filed Sept. 22, 1937

Now Comes the above named defendants, Henry Feuerstein and Helen Feuerstein, by Moran & O'Brien, their attorneys, and demur to the complaint of the plaintiff in the above entitled action, and specify as grounds of objection thereto

That it appears from the face of said complaint that the same does not state facts sufficient to constitute a cause of action.

Moran & O'Brien, Attorneys for Defendants Henry Feuerstein and Helen Feuerstein.

Dated September 17, 1937.

[fol. 18] Service admitted Sept. 18, 1937.

J. J. McManamy, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 19] IN CIRCUIT COURT OF WALWORTH COUNTY

[Title omitted]

DEMURRER OF GEORGE O'BRIEN

The defendant, George O'Brien, by Thorson & Seymour, his attorneys, demurs to the complaint of the plaintiff and to each of the three causes of action therein set forth, upon the ground that it appears upon the face thereof;

1. That the complaint does not state facts sufficient to constitute a cause of action.

2. That several causes of action have been improperly united.

Thorson & Seymour, Attorneys for George O'Brien, Elkhorn, Wisconsin.

[fol. 20] In Circuit Court of Walworth County

[Title omitted]

Demurrer of Roscoe R. Luce—Filed Nov. 1, 1937

The defendant, Roscoe R. Luce, by Thorson & Seymour, his attorneys, demurs to the complaint of the plaintiff and to each of the three causes of action therein set forth, upon the ground that it appears upon the face thereof:

1. That the complaint does not state facts sufficient to constitute a cause of action.

2. That several causes of action have been improperly united.

Thorson & Seymour, Attorneys for Roscoe R. Luce, Elkhorn, Wisconsin.

[fol. 20½] Due Personal Service of the within demurrer admitted this 15th day of Sept. A. D. 1937.

J. J. McManamy, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 21] In Circuit Court of Walworth County

[Title omitted]

Notice of Trial

Please Take Notice that the issues raised by the demurrer in the above entitled action will be brought on for trial before the Court at the Court House in the city of Elkhorn, Walworth County, Wisconsin, on the 1st day of November, 1937, at 10:00 o'clock in the forenoon, or as soon thereafter as counsel can be heard.

J. J. McManamy.

To Thorson and Seymour, Elkhorn, Wisconsin, and to Moran and O'Brien, Delavan, Wisconsin, Attorneys for the Defendants.

[fol. 22] In Circuit Court of Walworth County

[Title omitted]

Order on Demurrers—Dec. 21, 1937

This action having been brought to trial on the issues of law joined herein, after hearing Thorson & Seymour, Attorneys, in support of the demurrers filed by the defendants Roscoe R. Luce and George O'Brien, and Moran & O'Brien attorneys, in support of the demurrers filed by the defendants Henry Feuerstein and Helen Feuerstein, and J. J. McManamy, attorney for the plaintiff in opposition:

Ordered, that the general demurrers by the defendants Roscoe R. Luce, Henry Feuerstein and Helen Feuerstein be sustained as to each of the three causes of action and that the general demurrer of the defendant George O'Brien be sustained as to the first and third causes of action, and that said defendants have judgment thereon; but with leave [fols. 23-24] to the plaintiff to amend the complaint within twenty (20) days, without costs.

It is Further Ordered, that the general demurrer of the defendant George O'Brien to the second cause of action be overruled, and that the plaintiff have judgment thereon; but with leave to the defendant George O'Brien to serve and file an answer, within twenty (20) days, without costs.

By the Court.

Edgar V. Werner, Circuit Judge.

[fols. 25-26] In Supreme Court of Wisconsin

Walworth Circuit Court

Ernest Newton Kalb, Appellant,

vs.

Roscoe R. Luce, Henry Feuerstein, Helen Feuerstein and George O'Brien, Respondents

Opinion by Chief Justice Rosenberry

Judgment—May 17, 1938

This cause came on to be heard on appeal from the order of the Circuit Court of Walworth County and was argued

by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that upon the appeal of the plaintiff that part of the order of the Circuit Court of Walworth County, appealed from, be, and the same is hereby, affirmed with costs against the said appellant taxed at the sum of One Hundred Thirty-four and 18/100 ($134.18) Dollars.

And that upon the motion to review of the defendant George O'Brien, so much of the order of the Circuit Court of Walworth County as overrules the demurrer as to the second cause of action, be, and the same is hereby, reversed.

And that this cause be, and the same is hereby, remanded to the said Circuit Court for further proceedings according to law.

[fol. 27] [File endorsement omitted]

IN SUPREME COURT OF WISCONSIN, JANUARY TERM, 1938

No. 105

ERNEST NEWTON KALB, Appellant,

vs.

ROSCOE R. LUCE et al., Respondents

Appeal from an order of the circuit court for Walworth county: Edgar V. Werner, Circuit Judge. Affirmed in part; reversed in part.

OPINION—Filed May 17, 1938

This action was commenced on September 1, 1937, by Ernest Newton Kalb, plaintiff, against Roscoe R. Luce, County Judge for Walworth county, Henry Feuerstein, Helen Feuerstein and George O'Brien, sheriff, charging the defendants with conspiracy, assault and battery and false imprisonment. There was a demurrer to the complaint and from an order sustaining the demurrer entered December 23, 1937, the plaintiff appeals. All of the parties to the action reside in Walworth county.

Prior to March 7, 1933, the plaintiff and his wife had executed and delivered to the defendants Feuerstein a mortgage to secure an indebtedness. Proceedings were begun

and a judgment of foreclosure was entered on April 21, 1933. On October 2, 1934, the plaintiff filed a petition under the Frasier-Lemke act. No stay of proceedings was granted either in the state or the federal court. On June 27, 1935, [fol. 28] the plaintiff's petition was dismissed by the federal court. The Feuersteins then proceeded in the state court and a sheriff's sale was held July 20, 1935. A sheriff's deed was delivered to the purchaser August 2, 1935, and the sheriff's sale on due notice was confirmed September 16, 1935.

On August 28, 1935, congress passed the second Frazier-Lemke act. On September 6, 1935, plaintiff's petition in the bankruptcy court was reinstated and the order of June 27, 1935, vacated. No stay of the foreclosure proceeding was entered or applied for in either the state or the federal court.

Upon the petition of the plaintiffs in the foreclosure action on December 16, 1935, a writ of assistance fair on its face was delivered to the defendant, George O'Brien, as sheriff. On March 12, 1936, the sheriff ejected the plaintiff from the mortgaged premises.

For his first cause of action the plaintiff charges the defendants with conspiring and colluding together to acquire possession of his farm and seeks to recover damages for being deprived of the use thereof in the sum of $7,000.

The second cause of action charges the defendant, George O'Brien, with assaulting and beating the plaintiff pursuant to the direction of the other defendants. The third cause of action charges the defendants with false imprisonment and seeks to recover damages therefor.

The demurrer to the complaint was on two grounds: (1st) on the ground that it stated no cause of action against the defendants; and (2d) that several causes of action were improperly joined. The court sustained the demurrer as to the first and third causes of action as to all of the defendants; as to the second cause of action it sustained the demurrer as to Luce and the defendants Feuerstein but held that it stated a good cause of action against the defendant O'Brien for assault and battery and the defendant O'Brien was given twenty days in which to plead.

[fol. 29] ROSENBERRY, C. J.:

Upon this appeal the plaintiff contends that on and after September 6, 1935, when plaintiff's petition in the bank-

ruptcy court was reinstated, the county court for Walworth county was wholly without jurisdiction to proceed to confirm the sale held August 2, 1935, and to execute the judgment of foreclosure. Plaintiff's contention arises under the amendment to sec. 75 of the bankruptcy act enacted by congress August 23, 1925 (11 U. S. C. A., sec. 203 (n), which is printed in the margin.[1]

It is the contention of the plaintiff that this statute is self executing,—that is, that it requires no application to the state or federal court in which foreclosure proceedings are pending for a stay; in other words, that it provides for a statutory and not for a judicial stay. Plaintiff's claims under the bankruptcy act present a question which clearly arises under the laws of the United States and therefore present a federal question upon which determination of the federal courts is controlling.

[fol. 30] It has been held by the circuit court of appeals for the ninth district, Hardt v. Kirkpatrick (1937), 91 F. (2d) 875, that a stay provided for by sec. 75 (o) and sec. 75 (s) is a judicial stay and not a statutory stay. While the plaintiff in this action claims his rights under sec. 75 (n) the

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[1] "(n) The filing of a petition or answer with the clerk of court, or leaving it with the conciliation commissioner for the purpose of forwarding same to the clerk of court, praying for relief under section 75 of this Act, as amended (this section), shall immediately subject the farmer and all his property, wherever located, for all the purposes of this section, to the exclusive jurisdiction of the court, including all real or personal property, or any equity or right in any such property, including, among others, contracts for purchase, contracts for deed, or conditional sales contracts, the right or the equity of redemption where the period of redemption has not or had not expired, or where a deed of trust has been given as security, or where the sale has not or had not been confirmed, or where deed had not been delivered, at the time of filing the petition.

"In all cases where, at the time of filing the petition, the period of redemption has not or had not expired, or where the right under a deed of trust has not or had not become absolute, or where the sale has not or had not been confirmed, or where deed had not been delivered, the period of redemption shall be extended or the confirmation of sale withheld for the period necessary for the purpose of carrying out the provisions of this section." 11 U. S. C. A. sec. 203 (n).

same reasoning applied in the Hardt case leads to the same conclusion in this case. Under the amendment to sec. 75 of the bankruptcy act, the federal courts have consistently conformed to this conclusion. See cases cited 11 U. S. C. A., p. 1004, under title "Foreclosure of mortgage". See In re Arend (D. C. Mich., 1934), 8 F. Supp. 211. The circuit court of appeals, seventh circuit, held In Re Lowmon—La Fayette Life Ins. Co. v. Lowmon (1935), 79 F. (2d) 887, that the bankruptcy act could not be so construed as to extend the period of redemption which had expired according to the provisions of a state statute and if so construed it would be unconstitutional.

The defendant O'Brien seeks a review of that part of the order which holds that a cause of action for assault and battery is stated as to him. There is no allegation in the second cause of action that the defendant O'Brien used any excessive force or that he used more force than was reasonably necessary to put the defendants Feuersteins in possession of the mortgaged premises and to execute the writ of assistance. It is claimed that the acts of O'Brien were wrongful because without warrant in law. This contention is based upon the same grounds upon which the other contentions were made,—that is, that the court was wholly without jurisdiction to confirm the sale or to issue the writ of assistance. If as we hold the writ of assistance was validly issued then the allegations contained in the second conten-
[fols. 31-32] tion with respect to assault and battery are insufficient.

By the Court.—Upon the appeal of the plaintiff that part of the order appealed from is affirmed. Upon motion to review of the defendant O'Brien, so much of the order as overrules the demurrer as to the second cause of action is reversed and cause remanded for further proceedings according to law.

[fols. 33-34] In Supreme Court of Wisconsin

[Title omitted]

Motion for Rehearing—Filed June 2, 1938

The appellant moves for a rehearing in this case on the only question discussed in the opinion of the Court.

Dated: June 2, 1938.

J. J. McManamy, Attorney for Appellant.

[File endorsement omitted.]

[fols. 35-36] IN SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER DENYING REHEARING—June 29, 1938

The Court being now sufficiently advised of and concerning the motion of the said appellant for a rehearing in this cause, it is now here ordered that said motion be, and the same is hereby, denied without costs.

[fol. 37] IN SUPREME COURT OF WISCONSIN

[File endorsement omitted]

[Title omitted]

OPINION ON MOTION FOR REHEARING—Filed June 27, 1938

ROSENBERRY, C. J.:

On Motion for rehearing.. The appellant has moved for a rehearing upon the authority of James M. Wright, Petitioner, v. Union Central Life Insurance Company.—U. S. decided May 31, 1938. That case does not deal with and so far as we can see, has no bearing upon the question involved in this case and in the companion case. It holds the provisions considered constitutional. The plaintiff proceeds upon the theory that the order of the county court for Walworth county confirming the sale was without jurisdiction because after the plaintiff in this action had filed his petition under section 75 of the bankruptcy act as amended on August 28, 1935, the state court was without jurisdiction to proceed. There was no motion for a stay either in the federal court or in the state court, the plaintiff's theory being that the filing of the petition divested the state court of all jurisdiction to proceed in the action then pending before it.

[fol. 38] It is considered that plaintiff's position is not well taken. It may be conceded that the filing of the petition in the federal court created certain rights which the plaintiff in this action might have asserted either in the federal court or in the state court. However, the plaintiff failed to assert such rights either in the federal or state court as has already

been stated. All that this court is called upon to do is to determine whether or not the order of confirmation was valid and that depends upon whether the county court for Walworth county had jurisdiction to make the determination. If it should be held that the mere filing of the petition divested the state court of jurisdiction the whole matter would be thrown into inextricable confusion. No one would know whether a judgment of foreclosure of a state court with an order confirming a sale thereunder was valid or void until a search had been made of the records of the federal courts.

We need not consider nor discuss the question whether the congress has power to divest the jurisdiction of a state court which has once attached. That question is not presented by this record. It would seem from a consideration of sec. 75 as amended that the filing of the petition automatically operated to extend the period of redemption. It is possible that that state of facts if made to appear would make the order of the trial court erroneous but the order would be within the power of the court to make. No appeal having been taken, no showing having been made in the state court, an order of sale having been confirmed and the purchaser put in possession, the plaintiff is in no position to claim that the order of the circuit court is void.

We adhere to our former determination that the provisions of sec. 75 were not intended to provide for a statutory stay but to create rights when properly asserted are grounds for a judicial stay.

[fols. 39-73] Nor do we find anything in the case of Adair v. Bank of America National Trust and Savings Association, — U. S. —, decided February 28, 1938, to the contrary. While it is stated in that opinion that sec. 75 provides that the filing of the petition shall effect a stay, the cases cited in support of the proposition are cases relating to the power of a court of bankruptcy to stay proceedings and it is held that courts of bankruptcy have that power. The court said:

"In order to operate and protect the property during the stay, and pending confirmation or other disposition of the composition or extension proposal, the statute provides in subsections (e) and (n) for the exercise by the court of 'such control over the property of the farmer as the court deems in the best interests of the farmer and his creditors.' These provisions look toward the maintenance of the farm as a going concern, and afford clear authority,

in a proper case, for the continuance of the operations of the farm after the filing of a petition under Section 75 of the Bankruptcy Act."

See Wright v. Vinton Branch (1937), 300 U. S. 440, at 466.

By the Court.—Motion denied without costs.

[fols. 1-2] In Circuit Court of Walworth County, State of Wisconsin

Ernest Newton Kalb, Plaintiff,

vs.

Roscoe R. Luce, Henry Feuerstein, Helen Feuerstein and George O'Brien, Defendants

Notice of Appeal—Filed in Supreme Court, Feb. 11, 1939

Please Take Notice That the plaintiff, Ernest Newton Kalb, above named, hereby appeals to the Supreme Court of the State of Wisconsin from a judgment rendered by the above named Court herein, entered on the 29th day of December, 1938, in favor of the defendants and against the plaintiff dismissing the plaintiff's complaint and assessing costs against the plaintiff and from the whole of such judgment.

Dated this 24th day of January, 1939.

J. J. McManamy, Plaintiff's Attorney.

To: Thorson & Seymour, Attorneys for Roscoe R. Luce, and George O'Brien.

To: Moran & O'Brien, Attorneys for Henry Feuerstein and Helen Feuerstein.

To: Harry Dunbar, Clerk Circuit Court, Walworth County, Wisconsin.

[fol. 3] Bond on Appeal for $250.00, filed Feb. 11, 1939. Omitted in printing.

[fols. 4-6] Affidavits of service of notice of appeal and bond omitted in printing.

[fol. 7] Harry D. Dunbar, filed Jan. 27, 1939, Clerk of Courts.

[fol. 8] IN CIRCUIT COURT OF WALWORTH COUNTY

[Title omitted]

ORDER SUSTAINING DEMURRER OF DEFENDANT, GEORGE O'BRIEN, TO SECOND CAUSE OF ACTION PURSUANT TO DIRECTION OF SUPREME COURT—Filed Dec. 1, 1938

This action having been tried at the September term, 1937, of this Court before the Court on the issues of law joined herein, and the Court on December 21, 1937 having ordered that the general demurrers of the defendants, Roscoe R. Luce, Henry Feuerstein and Helen Feuerstein be sustained as to each of the three causes of action and that the general demurrer of the defendant, George O'Brien, be sustained as to the first and third causes of action and that the defendants have judgment thereon, but with leave to the plaintiff to amend within twenty (20) days, and having overruled the general demurrer of the defendant, George O'Brien to the second cause of action and directing that plaintiff have judgment thereon but with leave to the defendant, George O'Brien to answer within twenty (20) days; and the plaintiff having duly appealed from the portion of said order sustaining the demurrers to the Supreme Court and the defendant, George O'Brien, having served [fol. 9] Notice of Motion to Review and the order overruling his demurrer to the second cause of action; and the Supreme Court by decision filed May 17, 1938 having affirmed that portion of the order sustaining the demurrers and having reversed that portion of the order overruling the demurrer of the defendant, George O'Brien, to the second cause of action and said Court, by decision filed June 29, 1938 having denied plaintiff's motion for rehearing; and the plaintiff having appealed from said decision to the Supreme Court of the United States and that Court, on October 24, 1938, having dismissed said appeal; and the record in this cause having been duly remitted by the United States Supreme Court to the Supreme Court of Wisconsin and by it to this Court, with directions that judgment be rendered in favor of the defendants, in accordance with its mandate.

Now, On Motion of Thorson & Seymour, attorneys for the defendant, George O'Brien,

It is Ordered, that that portion of the order herein made December 21, 1937, overruling the general demurrer of the

defendant, George O'Brien, to the second cause of action and directing that plaintiff have judgment thereon, be and the same hereby is vacated, pursuant to direction of the Supreme Court.

It is Further Ordered, pursuant to the mandate of the Supreme Court, that the general demurrer of the defendant, George O'Brien to the second cause of action be sustained and that he have judgment thereon; but with leave to the plaintiff to serve and file an amended complaint within twenty (20) days, upon payment of Ten ($10.00) dollars costs.

By the Court.

Edgar V. Werner, Circuit Judge.

Dated November 30, 1938.

[fol. 9a] [File endorsement omitted]

[fol. 10] In Circuit Court of Walworth County

Ernest Newton Kalb, Plaintiff,

vs.

Roscoe R. Luce, Henry Feuerstein, Helen Feuerstein and George O'Brien, Defendants

Judgment—Filed Dec. 29, 1938

An order having been entered in this action on December 21, 1937, sustaining the demurrers of the defendants, Roscoe R. Luce, Henry Feuerstein, and Helen Feuerstein, to each of the three causes of action of the complaint herein, and sustaining the demurrer of the defendant, George O'Brien to the first and third causes of action of the complaint and that the defendants have judgment thereon, but with leave to the plaintiff to amend within twenty days, and having overruled the demurrer of the defendant, George O'Brien, to the second cause of action, and directing that plaintiff have judgment thereon, but with leave to the defendant, George O'Brien to answer within twenty days; and the plaintiff having duly appealed from that portion of the order sustaining the demurrers to the Supreme Court, and the defendant, George O'Brien having served notice of

motion to review the order overruling his demurrer to the second cause of action; and the Supreme Court, by decision [fol. 11] filed May 17, 1938, having affirmed that portion of the order sustaining the demurrers, and having reversed that portion of the order overruling the demurrer of the defendant, George O'Brien, to the second cause of action, and said Court, by decision filed June 29, 1938, having denied plaintiff's motion for rehearing; and the plaintiff having appealed from said decision to the Supreme Court of the United States, and that Court, on October 24, 1938, having dismissed said appeal; and an order having been entered herein, after remittitur, pursuant to direction of the Supreme Court, vacating that portion of the order made December 21, 1937, overruling the demurrer of the defendant, George O'Brien, to the second cause of action, and an order having been entered November 30, 1938, sustaining the demurrer of the defendant, George O'Brien to the second cause of action and directing that he have judgment thereon but with leave to the plaintiff to serve and file an amended complaint within twenty days, upon payment of costs, and notice of the entry of said order having been served on December 2, 1938, and proof of service being on file, and more than twenty days having elapsed since such service and the plaintiff having failed to amend his complaint as said order allowed and having indicated that he desires judgment entered on the orders and that he does not desire to amend;

Now, On Motion of Thorson & Seymour, attorneys for the defendants, Roscoe R. Luce and George O'Brien, and on motion of Moran & O'Brien, attorneys for the defendants, Henry Feuerstein and Helen Feuerstein,

It is Ordered and Adjudged that the complaint herein be, and the same is, hereby dismissed, and that the defendants, [fol. 12] Roscoe R. Luce and George O'Brien, have and recover their costs of the plaintiff, taxed at One Hundred Nine and 75/100 dollars, and the defendants, Henry Feuerstein and Helen Feuerstein, have and recover their costs of the plaintiff, taxed at One Hundred Three and 95/100 dollars.

By the Court, Edgar V. Werner, Circuit Judge.

December 27, 1938.

[fol. 13] [File endorsement omitted.]

[fol. 14] [File endorsement omitted]

IN SUPREME COURT OF WISCONSIN

ERNEST NEWTON KALB, Appellant,

vs.

ROSCOE R. LUCE, HENRY FEUERSTEIN, HELEN FEUERSTEIN, and GEORGE O'BRIEN, Respondents

NOTICE OF MOTION TO ADVANCE, ETC.—Filed March 25, 1939

Please Take Notice that on the 11th day of April, 1939, at the opening of Court on that day or as soon thereafter as counsel can be heard the appellant will move for an order:

(a) To advance the cause on the calendar, and

(b) That the cause may be decided by the Court without the filing of printed case and without further notice to the parties.

Dated this 20th day of March, 1939.

James J. McManamy, Attorney for Appellant.

To: Thorson & Seymour, Attorneys for Respondents, Roscoe R. Luce and George O'Brien.

To: Moran & O'Brien, Attorneys for Respondent, Henry Feuerstein and Helen Feuerstein.

Admission of service admitted this 21 day of March, 1939.
Thorson & Seymour, Attorney for Respondents Roscoe R. Luce and George O'Brien. J. Arthur Moran for Moran & O'Brien, Attorneys for Respondent Henry and Helen Feuerstein.

[fol. 15] AFFIDAVIT OF JAMES J. MCMANAMY

STATE OF WISCONSIN,
County of Dane, ss:

James J. McManamy, being first duly sworn says that he is the attorney for the appellant in this action and makes this affidavit in his behalf. That this cause was before this Court on April 12, 1938, on an appeal from an order sustaining a demurrer to the complaint and the appeal was

decided by this Court on June 29, 1938 (228 Wis. 519), affirming the order sustaining the demurrer, as to the respondents Roscoe R. Luce, Henry Feuerstein, and Helen Feuerstein, reversing the order as to the respondent George O'Brien.

That thereafter an appeal was taken to the Supreme Court of the United States from the judgment of this Court. That the appeal was dismissed because final judgment had not been entered by the trial court.

That thereafter the record was remitted to the Circuit Court for Walworth County and judgment dismissing the complaint was entered in that Court.

That an appeal from the judgment so dismissing the complaint is now pending in this Court and the appellant is desirous of having the matter determined by this Court [fols. 16-17] at the earliest date possible, and by his attorney James J. McManamy makes this affidavit bringing these facts to the attention of the Court to the end:

(a) An order may be made advancing said cause on the calendar, and

(b) that the cause may be decided by this Court without the filing of printed case and without further notice to the parties.

James J. McManamy.

Subscribed and sworn to before me this 20 day of March, 1939.

Mabel Graves, Notary Public, Dane County, Wis.
(Seal.)

[fol. 18] IN SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER DENYING MOTION TO AMEND FORMER OPINION—April 11, 1939

And now at this day came the said respondents, by their attorney, and moved the court now here to amend the former opinion by deciding two additional questions, which motion having been argued by A. T. Thorson, Esq., and J. Arthur Moran, Esq., for the said respondents, and by

J. J. McManamy, Esq., for the said appellant, and submitted, and the court being now sufficiently advised of and concerning the said motion, it is now here ordered that said motion be, and the same is hereby, denied.

[fol. 19] IN SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER GRANTING MOTION FOR JUDGMENT, ETC.—April 11, 1939

And now at this day came the said appellant, by his attorney, and moved the court now here to place this cause on the calendar and assign same for argument on the May call, and without printed case and briefs, and for judgment on the record, which motion having been argued by J. J. McManamy, Esq., for the said appellant, and by A. T. Thorson, Esq., and J. Arthur Moran, Esq., for the said respondents, and submitted, and the court being now sufficiently advised of and concerning the said motion, it is now here ordered that the motion for judgment on the record, be, and the same is hereby, granted.

[fols. 20-21] IN SUPREME COURT OF WISCONSIN

ERNEST NEWTON KALB, Appellant,

vs.

ROSCOE R. LUCE, HENRY FEUERSTEIN, HELEN FEUERSTEIN AND GEORGE O'BRIEN, Respondents

JUDGMENT—April 20, 1939

This cause came on to be heard on appeal from the judgment of the Circuit Court of Walworth County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Walworth County, in this cause, be, and the same is hereby, affirmed with costs against the said appellant taxed at the sum of Twenty-eight and 50/100 ($28.50) Dollars.

[fol. 22] [File endorsement omitted]

IN SUPREME COURT OF WISCONSIN, JANUARY TERM 1939

ERNEST NEWTON KALB, Appellant,

vs.

ROSCOE R. LUCE ET AL., Respondents

Appeal from a judgment of the circuit court for Walworth county.

Edgar V. Werner, Circuit Judge

Affirmed.

This case was here upon a former appeal which was from an order sustaining a demurrer. The Supreme Court of the United States having declined to review the determination of this Court because it was not final, the record was remitted to the trial court. There such proceedings were had that a final judgment dismissing the plaintiff's complaint was entered on December 29, 1938. From that judgment the plaintiff appeals.

OPINION—Filed April 20, 1939

[fol. 23] By the Court:

The issues raised upon this appeal were considered by this Court in Kalb v. Luce (1938), 228 Wis. 519, 279 N. W. 685. For the reasons there stated as grounds for sustaining the demurrer to the complaint, the judgment of the court dismissing the complaint should be affirmed.

The judgment appealed from is affirmed.

[fol. 24] IN SUPREME COURT OF WISCONSIN

[Title omitted]

[File endorsement omitted]

ORDER ALLOWING APPEAL—Filed May 19, 1939

The petition of Ernest Newton Kalb, appellant in the above entitled matter, for an appeal therein to the Supreme

Court of the United States from the Supreme Court of the State of Wisconsin, and the Assignment of Errors filed herewith and the record of said cause having been considered:

It Is Ordered: That an appeal be and is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of Wisconsin as prayed in said petition and the Clerk of the Supreme Court of the State of Wisconsin shall prepare and certify a transcript of the records and proceedings in the above entitled cause as shall be designated by precipe of the parties and transmit the same to the Supreme Court of the United States within thirty days from date hereof.

It Is Further Ordered: That the appellant will execute his undertaking in the sum of five hundred Dollars conditioned that he shall prosecute said appeal to effect and if appellant shall fail to make his plea good to answer all damages and costs of the respondents.

It Is Further Ordered: That the appeal herein shall operate as a supersedeas.

Marvin B. Rosenberry, Chief Justice of the Supreme Court of the State of Wisconsin.

May 19th, 1939.

[fol. 25] IN SUPREME COURT OF WISCONSIN

[Title omitted]

PETITION FOR APPEAL—Filed May 19, 1939

The petitioner, Ernest Newton Kalb, respectfully represents that he is a citizen of the United States and a resident of the State of Wisconsin, and considering himself aggrieved by the final decision of the Supreme Court of the State of Wisconsin in the above entitled cause wherein he is the appellant, hereby prays that an appeal be allowed to the Supreme Court of the United States from the decree entered in said cause by the Supreme Court of the State of Wisconsin on the 20th day of April, 1939, affirming the judgment of the Circuit Court for Walworth County, Wisconsin, entered December 29th, 1938, dismissing the complaint.

Statement

The case is one in which the validity of the statute of the United States id drawn in question, to-wit, 49 Statutes at Large 943, Chapter 792, approved August 28, 1935, amending Section 75 (n) of the Bankruptcy Act and known as the new Frazier-Lemke Act wherein the Supreme Court of the State of Wisconsin decided a federal question of substance not theretofore determined by the Supreme Court of the United States. That the part of the said statute under which the appellant asserts his rights relates to the exclusive [fol. 26] jurisdiction of the federal court of the person of the petitioner and all of his property after the filing of his petition pursuant to said act. The appellant asserts that his rights under this statute have been denied because the Supreme Court of the State of Wisconsin has decided that this statute of itself does not effect a stay of proceedings in a mortgage foreclosure pending in a state court at the time the appellant filed his petition under Section 75 (n) of the Bankruptcy Act, thereby drawing in question the validity of a federal statute and deciding in a way probably not in accord with applicable decisions of the Supreme Court of the United States.

Manner in Which the Question Arose of the Trial Court

The complaint sets up that the appellant is a farmer, and that on the 2nd day of October, 1934, he filed his petition in the District Court of the United States for the Eastern District of Wisconsin under Section 75 (n) of the Bankruptcy Act as amended, that foreclosure of a mortgage on his farm was pending in a county court at that time. That his petition for relief under the Bankruptcy Act was dismissed on the 27th day of June, 1935. That after the amendment of Section 75 approved August 28, 1935, to-wit, on the 6th day of September, 1935, the appellant's petition was reinstated in the District Court of the United States and on that day a certified copy of such order of reinstatement was served upon the Judge of the Court in which the mortgage foreclosure was pending. That on the 16th day of September, 1935, the said Judge entered an order in his court confirming a sheriff's report of sale theretofore had in the foreclosure proceedings and directed the delivery of a deed thereunder to the purchaser. The appellant asserts that the county court was wholly without jurisdiction to confirm

the sheriff's report of sale on September 16, 1935, and was without jurisdiction to direct the delivery of a deed by the sheriff and that such order is wholly void.

[fol. 27] The defendants interposed a demurrer to the complaint which was sustained by the Circuit Court for Walworth County and on appeal to the Supreme Court of Wisconsin the order of the trial court sustaining the demurrer was affirmed; and on December 29, 1938, judgment was entered in the Circuit Court dismissing the complaint.

Assignment of Error

(a) The Court erred in its judgment and decree in directing that the order of the Circuit Court for Walworth County sustaining the demurrer of Roscoe R. Luce, Henry Feuerstein, and Helen Feuerstein be affirmed.

(b) The Court erred in its judgment and decree in directing that the order of the Circuit Court for Walworth County overruling the demurrer of George O'Brien be reversed.

(c) The Court erred in its judgment and decree in affirming the judgment of the Circuit Court dismissing the complaint.

Prayer for Reversal

For which errors the appellant above, Ernest Newton Kalb, prays that the said judgment of the Supreme Court of the State of Wisconsin made on the 20th day of April, 1939, in the above entitled cause be reversed and judgment ordered in favor of this appellant, and that an authenticated transcript of the proceedings in this court may be transmitted to the Supreme Court of the United States, and that an order be entered fixing the amount of the bond to be required of the appellant in connection with this petition for appeal.

Ernest Newton Kalb, Petitioner.

[fol. 28] *Duly sworn to by Ernest Newton Kalb. Jurat omitted in printing.*

[fols. 29-33] [File endorsement omitted.]

[fols. 34-35] Bond on appeal for $500.00, filed May 25, 1939, omitted in printing.

[fols. 36-41] Citation, in usual form, showing service on W. L. Seymour et al., filed May 31, 1939, omitted in printing.

[fol. 42] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 43-46] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1938

No. 374

ERNEST NEWTON KALB, Appellant,

vs.

ROSCOE R. LUCE, HENRY FEUERSTEIN, HELEN FEUERSTEIN, and GEORGE O'BRIEN

ORDER AS TO RECORD ON FORMER APPEAL—Filed April 29, 1939

On the Petition hereto annexed:

It Is Ordered: That the transcript of the record of the Supreme Court of the State of Wisconsin now on file in this Court may be used by the appellant in so far as the same is applicable on an appeal to this Court from the judgment entered in the Supreme Court of the State of Wisconsin on April 20th, 1939.

Dated this 29 day of April, 1939.

Charles E. Hughes, Chief Justice.

[fol. 46½] [File endorsement omitted.]

[fol. 47] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed June 19, 1939

Comes now the appellant in the above entitled cause and states that the points upon which he intends to rely in this Court in this case are as follows:

Point I. That the Supreme Court of Wisconsin erred in finding and holding that the order of the Circuit Court for Walworth County:

(a) Sustaining the demurrer of Roscoe R. Luce, and Henry Feuerstein and Helen Feuerstein to the complaint be affirmed;

(b) and in finding and holding that the order sustaining the demurrer of George O'Brien to the first and third cause of action be affirmed;

(c) and that the order overruling the demurrer of the defendant George O'Brien as to the third cause of action be reversed.

Point II. That the Supreme Court of Wisconsin erred in affirming the judgment of the trial court dismissing the complaint.

[fol. 48] And the appellant further states that only the following parts of the record, as filed in this Court, need be printed by the Clerk for the hearing of the case:

Title of Paper:

Plea to Wisconsin Supreme Court
Order Circuit Court allowing to amend complaint.
* Affidavit of default and proof of service.
Judgment dismissing the complaint.
Notice of appeal to Supreme Court of Wisconsin and proof of service.
Undertaking on appeal and proof of service.
Notice motion to advance cause for argument and decision and proof of service.

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* Not in original record: See Pages 7 & 8, Kalb v. Feuerstein.

Order granting motion to advance cause for decision.

Order Supreme Court denying defendants motion to modify former opinion.

Opinion of Supreme Court of Wisconsin.

Order allowing appeal to the United States Supreme Court and affidavit.

Separate statement for jurisdiction.

Citation and proof of service.

Præcipe and proof of service.

Undertaking on appeal to Supreme Court of the United States.

William Lemke, Fargo, North Dakota, Appellants Attorney. James J. McManamy, Madison, Wisconsin, Appellants Attorney.

[fol. 49] [File endorsement omitted]

Endorsed on cover: Enter William Lemke. File No. 43,528. Wisconsin Supreme Court. Term No. 121. Ernest Newton Kalb, Appellant, vs. Roscoe R. Luce, Henry Feuerstein, Helen Feuerstein and George O'Brien. Filed June 19, 1939. Term No. 121 O. T. 1939.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 120

ERNEST NEWTON KALB AND MARGARET KALB,
HIS WIFE,

Appellants;

vs.

HENRY FEUERSTEIN AND HELEN FEUERSTEIN,
HIS WIFE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

STATEMENT AS TO JURISDICTION.

WILLIAM LEMKE,
JAMES J. MCMANAMY,
Counsel for Appellants.

INDEX.

SUBJECT INDEX.

STATUTE CITED.

IN SUPREME COURT, STATE OF WISCONSIN

JANUARY TERM, 1939

Case No. ——.

ERNEST NEWTON KALB AND MARGARET KALB,
Appellants,

vs.

HENRY FEUERSTEIN AND HELEN FEUERSTEIN, His Wife,
Appellees.

NATURE OF THE CASE, ACTION TO CANCEL AND EXPUNGE FROM THE RECORD A SHERIFF'S DEED AND PLACE, APPELLANT IN POSSESSION.

STATEMENT OF FEDERAL QUESTION CONFERRING JURISDICTION TO SUPREME COURT OF THE UNITED STATES.

Federal Question Presented.

The Federal question here presented is whether after the filing of a petition by a farmer under Section 75 (n) of the bankruptcy act as amended August 28, 1935, 49 Statutes at Large 943, Chapter 792, and while such petition is pending, a State court in which a mortgage foreclosure of the petitioner's farm is pending, such court has jurisdiction to confirm a sheriff's report of sale and direct the delivery of a deed to the mortgagee, the purchaser.

Manner in Which the Federal Question was Raised.

The appellants base their right to maintain this action on the ground that the order of the District Court of the United States for the Eastern District of Wisconsin made September 6, 1935, reinstating their petition which was filed on October 2, 1934, under Section 75 (n) of the Bankruptcy Act, 48 Statutes at Large 1289 Chapter 869, as amended August 28, 1935, 49 Statutes at Large 943 Chapter 792, instanter divested the State court of all jurisdiction to enter an order on September 16, 1935, confirming a sheriff's report of sale in a mortgage foreclosure had on July 20, 1935, and that the order so entered confirming such report of sale and directing the delivery of a sheriff's deed is wholly void. Section 75 (n) of the Bankruptcy Act, 49 Statutes at Large 943, Chapter 792, reads as follows:

> "That section 75 of said Act, as amended, be further amended by amending subsection (n) to read as follows:
>
> "(n) The filing of a petition or answer with the clerk of court, or leaving it with the conciliation commissioner for the purpose of forwarding same to the clerk of court, praying for relief under section 75 of this Act, as amended, shall immediately subject the farmer and all his property, wherever located, for all the purposes of this section, to the exclusive jurisdiction of the court, including all real or personal property, or any equity or right in any such property, including among others, contracts for purchase, contracts for deed, or conditional sales contracts, the right or the equity of redemption where the period of redemption has not or had not expired, or where a deed of trust has been given as security, or where the sale has not or had not been confirmed, or where deed had not been delivered, at the time of filing the petition."

The appellants assert that the filing of their petition vests the Federal court with exclusive jurisdiction of all of their

property and protects it from interference by State courts and divests all State courts of jurisdiction while their petition is so pending; that no restraining order to the State court is required to effect such protection.

How Question Raised in Trial Court.

A general demurrer to the complaint was sustained by the trial court decreeing that State court had such jurisdiction.

On Appeal to the Supreme Court of Wisconsin.

On appeal to the Supreme Court of Wisconsin the order sustaining the demurrer was affirmed.

On December 31st, 1938, the trial court entered judgment dismissing the complaint.

On appeal to the Supreme Court of Wisconsin the judgment dismissing the complaint was affirmed on April 20, 1939, and from such judgment this appeal is taken.

WILLIAM LEMKE,
Fargo, North Dakota,
Attorney for Appellant,
JAMES J. MCMANAMY,
Madison, Wisconsin,
Attorney for Appellant.

EXHIBIT "A".

STATE OF WISCONSIN: IN SUPREME COURT

JANUARY TERM, 1939

ERNEST NEWTON KALB, *Appellant,*

vs.

HENRY FEUESTEIN *et al., Respondents.*

Appeal from a judgment of the circuit court for Walworth County: EDGAR V. VERNER, Circuit Judge. *Affirmed.*

This case was here upon a former appeal which was from an order sustaining a demurrer. The Supreme Court of the United States having declined to review the determination of this Court because it was not final, the record was remitted to the trial court. There such proceedings were had that a final judgment dismissing the plaintiff's complaint was entered on December 31, 1938. From that judgment the plaintiff appeals.

By the Court.—The issues raised upon this appeal were considered by this Court in *Kalb* v. *Feuerstein* (1938), 228 Wis. 525, 279 N. W. 687. For the reasons there stated as grounds for sustaining the demurrer to the complaint, the judgment of the court dismissing the complaint should be affirmed.

The judgment appealed from is affirmed.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 120

ERNEST NEWTON KALB AND MARGARET KALB, HIS WIFE,

Appellants,

vs.

HENRY FEUERSTEIN AND HELEN FEUERSTEIN, HIS WIFE.

No. 121

ERNEST NEWTON KALB,

Appellant,

vs.

ROSCOE R. LUCE, HENRY FEUERSTEIN, HELEN FEUERSTEIN AND GEORGE O'BRIEN.

APPEALS FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

BRIEF OF THE APPELLANTS.

WILLIAM LEMKE,
JAMES J. McMANAMY,
ELMER McCLAIN,
Counsel for Appellants.

INDEX.

Subject Index.

Table of Cases Cited.

STATUTES CITED.

OTHER AUTHORITIES CITED.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 120

ERNEST NEWTON KALB AND MARGARET KALB, HIS WIFE,

Appellants,

vs.

HENRY FEUERSTEIN AND HELEN FEUERSTEIN, HIS WIFE.

No. 121

ERNEST NEWTON KALB,

Appellant,

vs.

ROSCOE R. LUCE, HENRY FEUERSTEIN, HELEN FEUERSTEIN AND GEORGE O'BRIEN.

BRIEF OF THE APPELLANTS.

Nature of Cases.

These cases are here on appeals from final judgments of the Supreme Court of Wisconsin, the highest court in that State. The cases arose under Section 75 of the Bankruptcy Act, being Section 203, Title 11, Bankruptcy, U. S. Code, as amended by Section 203, Title 11, Bankruptcy

Supplement 4, U. S. Code. The question involved is one of jurisdiction between the State Court and the United States District Court under Section 203 as amended.

Both of these cases arose from the same facts and transactions. Both involve the same question of law and the decision in one must necessarily govern the decision in the other.

Case No. 120 involves the question of appellants' title and right of possession to their farm under the jurisdiction of the United States District Court, proceeding under Section 75 of the Bankruptcy Act. (Case No. 120, R. 1 to 4, inc.)

Case No. 121 is a damage suit brought by appellant, Ernest Newton Kalb, against the respondents, Roscoe R. Luce, Henry Feuerstein, Helen Feuerstein and George O'Brien, based upon a conspiracy to obtain possession of the appellant's farm by trespass, assault, battery and false imprisonment. The question here is whether or not the appellant was in lawful possession of his farm, under the supervision of the United States District Court, under the provisions of Section 75 of the Bankruptcy Act, when he was forcibly evicted by the respondents. (Case No. 121, R. 1 to 7, inc.)

Opinion Below.

The Supreme Court of Wisconsin wrote its principal opinion in case No. 121, affirming the order sustaining the demurrer to the complaint. 228 Wisconsin 519; 279 Northwestern 685. The court also wrote its principal opinion on the motion for rehearing in case No. 121, *Kalb* v. *Luce, et al.*, 280 Northwestern 725. (Case 121, R. 14 to 16.)

These opinions the Supreme Court of Wisconsin adopted as its opinions when it affirmed the order dismissing the complaint in case No. 120. 228 Wisconsin 525; 279 Northwestern 687.

The Supreme Court of Wisconsin also made this opinion its opinion when it affirmed the judgments in both case No. 120 and 121. 231 Wisconsin 186; 185 Northwestern 431.

Therefore, to save the time of this Court, may we suggest that the only reasons given by the State Supreme Court for making the judgments final in both case No. 120 and 121 are set forth in the opinion of that court in 228 Wisconsin 519; 279 Northwestern 685, and, on rehearing, 280 Northwestern 725.

Jurisdiction.

Appeal was allowed in both of the above cases by the Supreme Court of Wisconsin to the Supreme Court of the United States under Section 344, Title 28, Judicial Code. (Case No. 120, R. 14 and 15. Case No. 121, R. 23 and 24.) The Supreme Court of the United States has jurisdiction because the validity and proper construction and interpretation of Section 203, Title 11, Bankruptcy, U. S. Code, as amended, a Federal statute, is involved. (Jurisdiction of the Supreme Court, Page 107, Section 60.)

Statement of the Case.

The State Supreme Court affirmed the orders sustaining the demurrers to the complaints and affirmed the judgments dismissing the appellants' actions. It denied the motions for rehearing. (Case No. 120, R. 7, 8 and R. 13, 14. Case No. 121, R. 9, 10 and 14.) Therefore all the material allegations of the complaints stand admitted. (Case No. 120, R. 1 to 4, inc. Case No. 121, R. 1 to 7.)

The appellants are farmers, husband and wife, who cultivated, resided upon and made their home on the 120-acre farm here in question. (Case No. 120, R. 1, 2, 3, and 4. Case No. 121, R. 1 and 2.)

Prior to March 7, 1933, the appellants had executed and delivered to the respondents a mortgage on said farm to

secure an indebtedness. (Case No. 120, R. 1. Case No. 121, R. 1 and 2.)

On April 21, 1933, foreclosure proceedings were begun in the Circuit Court of Walworth County, Wisconsin, and a judgment of foreclosure was entered on that date. (Case No. 120, R. 1. Case No. 121, R. 2.) Under the State law no sale can be made or advertised until the expiration of one year from date of judgment. Wisconsin Statutes, 1935, Sec. 278.10 Foreclosure.

On October 2, 1934, appellants filed their petition in the United States District Court, Eastern District of Wisconsin, under Section 203, Title 11, Bankruptcy, United States Code. (Case No. 120, R. 2. Case No. 121, R. 2.)

On June 27, 1935, after the decision of the Supreme Court of the United States in the *Radford* case, 295 U. S. 555, holding subsection (s) of Section 203 unconstitutional the United States District Court dismissed the appellants' petition. (Case No. 120, R. 3. Case No. 121, R. 2.)

On July 20, 1935 the Sheriff of Walworth County sold the farm under the judgment of foreclosure to the mortgagees, the respondents, but the sale was not confirmed at that time. (Case No. 120, R. 2. Case No. 121, R. 3.) Under the Wisconsin statute and under the decisions of the Supreme Court of that State title remains in the mortgagor until confirmation of sale and delivery of the sheriff's deed. Wisconsin Statutes, 1935, Sec. 278.17 Execution and Effect. *Gerhardt* v. *Ellis*, 134 Wisconsin 195.

On August 28, 1935, Congress amended some of the provisions of Section 203 and added a new subsection (s). Section 203, Title 11, Bankruptcy, Supplement 4, United States Code.

On September 6, 1935, after the above amendments, the United States District Court, Eastern District of Wisconsin, vacated its order of dismissal of June 27, 1935, and rein-

stated appellants' petition under Section 203, Title 11, Bankruptcy, U. S. Code, as amended. *On the same day a certified copy of the order of the District Court reinstating appellants' petition was served on the Judge of the Circuit Court of Walworth County.* (Case No. 120, R. 2. Case No. 121, R. 2.)

On September 9, 1935, when the motion for confirmation of the sheriff's sale was to be heard, *a certified copy of the order of reinstatement by the United States District Court was filed with the Circuit Court of Walworth County.* The hearing on the motion for confirmation of sale was deferred without date. (Case No. 120, R. 2. Case No. 121, R. 2.)

On September 16, 1935, the Judge of the Circuit Court of Walworth County, *without notice to appellants* and with *full knowledge of the reinstatement of appellants' petition,* confirmed the sale. (Case No. 120, R. 2 and 3. Case No. 121, R. 3.) This, although the laws of the State of Wisconsin *require notice.* Wisconsin Statute, 1935, Sec. 278.105 Application for Confirmation.

On September 20, 1935, the sheriff's deed to the mortgagee purchasers was recorded in the office of the Register of Deeds of Walworth County in Volume 240 of Deeds, page 464. (Case No. 120, R. 3. Case No. 121, R. 3.)

On December 16, on petition of the mortgagee purchasers, respondents, the Judge of the Circuit Court directed a writ of assistance to issue, and on the same day the Clerk of the Court issued the writ. (Case No. 120, R. 3. Case No. 121, R. 3 and 4.)

Thereafter, on March 12, 1936, the sheriff of Walworth County, Wisconsin, together with other persons, went to the premises of appellants and with force and arms broke into appellants' home and beat the appellant, Ernest Newton Kalb, in the presence of his wife and family; evicted them from their farm and placed the respondents in possession. (Case No. 120, R. 4. Case No. 121, R. 4.)

Case No. 120.

On August 31, 1937, appellants started the action in the Circuit Court of Walworth County which involves the question now before this Court. In that action the appellants asked that the sheriff's deed be annulled and be cancelled and expunged from the records of the Register of Deeds; that the respondents be removed from the farm and that appellants be replaced in possession (R. 1 to 4, inc.)

On September 17, 1937, the respondents demurred to the above complaint, thereby admitting the material facts set forth in the complaint (R. 4 and 5).

On December 20, 1937, the Judge of the Circuit Court of Walworth County sustained the demurrer (R. 5 and 6).

On January 3, 1939, the Circuit Court of Walworth County entered final judgment (R. 10). On April 20, 1939, the Supreme Court of the State of Wisconsin affirmed said judgment (R. 13 and 14). From that final judgment the case is before this Court on appeal.

Case No. 121.

On or about August 31, 1937, the appellant, Ernest Newton Kalb, started the action in the Circuit Court for Walworth County which involves the question now before this Court. In that action appellant asks for damages based upon a conspiracy between the respondents to obtain possession of appellant's farm by trespass, assault, battery, false imprisonment and unlawful eviction (R. 1 to 7).

To this complaint the defendants interposed demurrers, thereby admitting the material facts set forth in the complaint.(R. 7 and 8).

On December 21, 1937 and December 1, 1938, the Circuit Court of Walworth County sustained the demurrers (R. 9, 17 and 18).

On May 17, 1938 and on December 29, 1938, the Circuit Court of Walworth County entered final judgment in the

case (R. 9, 10, 18 and 19). On April 20, 1939, the Supreme Court of the State of Wisconsin affirmed said judgment (R. 22 and 23). From this final judgment the case is now before this Court on appeal.

Question Involved.

The sole and only question involved in both of these cases on this appeal is whether or not the provisions of subsections (n), (o), (p) and (s) of Section 203, Title 11, Bankruptcy, U. S. Code, as amended by Section 203, Title 11, Bankruptcy, Supplement 4, U. S. Code, are mandatory and self-executing. We submit they are. The ultimate question is whether or not the filing of a farmer-debtor's petition under Section 75 of the Bankruptcy Act is notice to the world that the exclusive jurisdiction of all the farmer-debtor's property is in the Federal Court of Bankruptcy. Again, we submit that it is.

The decisions of the Supreme Court of the State of Wisconsin would have us believe that it is a divided jurisdiction between the Federal and State Courts; that unless the Court of Bankruptcy prohibits the State Courts by some kind of stay order that then, in their discretion, they are at liberty to dissipate the farmer-debtor's estate. We feel the Lower Court is in error. *There is no divided jurisdiction in Section 203 of the Bankruptcy Act as amended.*

Specification and Assignment of Errors.

Case No. 120.

I.

The Supreme Court of Wisconsin erred in affirming the order of the Circuit Court of Walworth County sustaining the demurrer to the complaint.

II.

The Supreme Court of Wisconsin erred in affirming the judgment of the trial court dismissing the plaintiffs' complaint.

III.

The Supreme Court of Wisconsin erred when it held that Section 203, Title 11, Bankruptcy, U. S. Code, as amended by Section 203, Title 11, Bankruptcy, Supplement 4, U. S. Code, was not mandatory and self-executing but that the State Court had jurisdiction unless a stay order was issued by the Federal Court.

Case No. 121.

I.

The Supreme Court of Wisconsin erred in affirming the orders of the Circuit Court for Walworth County sustaining the demurrers of the respondents to the complaint.

II.

The Supreme Court of Wisconsin erred in affirming the judgment of the trial court dismissing the complaint.

III.

The Supreme Court of Wisconsin erred when it held that Section 203, Title 11, Bankruptcy, U. S. Code, as amended by Section 203, Title 11, Bankruptcy, Supplement 4, U. S. Code, was not mandatory and self-executing but that the State Court had jurisdiction unless a stay order was issued by the Federal Court.

Argument.

As stated before, the sole and only question involved in both of these cases is whether, after the farmer-debtor files

his petition under Section 75 of the Bankruptcy Act, the Federal Court has sole and absolute jurisdiction of all of his property to the exclusion of State courts.

The Supreme Court of the United States has held that *the filing of a petition in bankruptcy is notice to all the world that the sole jurisdiction of the bankrupt's property is in the Federal Court.* Yet the Supreme Court of Wisconsin arrived at a different conclusion. It says in its opinion:

> "It is the contention of the plaintiff that this statute is self executing—that is, that it requires no application to the state or federal court in which foreclosure proceedings are pending for a stay; in other words, that it provides for a statutory and not for a judicial stay. Plaintiff's claims under the bankruptcy act present a question *which clearly arises under the laws of the United States and therefore present a federal question upon which determination of the federal courts is controlling.*
>
> "It has been held by the circuit court of appeals for the ninth district, Hardt *v.* Kirkpatrick (1937), 91 F. (2d) 875, that a stay provided for by sec. 75 (o) and sec. 75 (s) is a judicial stay and not a statutory stay. . . ." (Case No. 121, R. 12.)

The State court in its opinion cites with approval *In re Lowmon*, 79 F. (2d) 887, *but it inadvertently overlooked the fact that that case was in effect twice overruled.* First, in the *Wright* v. *Vinton Branch Mountain Trust Company*, 300 U. S. 440, and then again in the case of *Wright* v. *Union Central Life Insurance Company*, 304 U. S. 502.

Even before Section 75 of the Bankruptcy Act was passed the courts universally held that there was no divided jurisdiction over the bankrupt's property between the Federal courts of bankruptcy and State courts.

> "Upon adjudication of bankruptcy, title to *all the property* of the bankrupt, wherever situated, *vests* in

the trustee as of the date of filing the petition in bankruptcy. The bankruptcy court has *exclusive* jurisdiction, and that court's possession and control of the estate *cannot be affected* by proceedings in other courts, State or Federal. Isaacs *v.* Hobbs Tie & T. Co., 282 U. S. 734, 737, and cases cited. Such jurisdiction having attached control of the *administration of the estate cannot be surrendered even by the court itself. Id.*, 739. *'The filing of the petition is a caveat to all the world and in fact an attachment and an injunction.'* May *v.* Henderson, 268 U. S. 111, 117." *Gross* v. *Irving Trust Co.*, 289 U. S. 342.

"When a statute is plain and unambiguous in its terms and not susceptible of more than one construction, courts are not concerned with the consequences that may result therefrom, but must enforce the law as they find it. If the meaning of a statute is plain, and its provisions are susceptible of but one interpretation, its consequences, if objectionable, can only be avoided by a change of the law itself, to be effected by legislative, and not judicial, action; the wisdom or policy of the law, the motives that prompted its enactment and the reasonableness or justice of its provisions cannot be taken into consideration by the courts in construing the statute." And cases there cited, 25 R. C. L., Statutes, Paragraph 255.

"Statutes must have a rational interpretation, to be collected not only from the words used, but from the policy which may be reasonably supposed to have dictated the enactment, and the interpretation should be rigorous or liberal, depending upon the interests with which it deals. • • • A remedial statute must be construed liberally so as to afford all the relief within the power of the court which the language of the act indicates that the legislature intended to grant." And cases there cited, 25 R. C. L., Statutes, Section 299.

Surely Section 75 did *not weaken* this jurisdiction but *strengthened* it. In fact it *made* that jurisdiction *more positive* than in any other section of the Bankruptcy Act.

When Congress enacted this Section it had for its object the public welfare—the protection of the submerged farmers of the nation. It intended the Act to be *mandatory* and *self-executing*, and we feel it did so in plain simple language. We set forth below the applicable portions of Section 75, U. S. C., Sup. 4, Title 11, Section 203, Subsections (n), (o) and (p).

"(n) *The filing of a petition* • • • praying for relief under this section, *shall immediately subject the farmer and all his property, wherever located, for all the purposes of this section, to the exclusive jurisdiction of the court,* including all real or personal property, or any equity or right in any such property, including, among others, contracts for purchase, contracts for deed, or conditional sales contracts, *the right or the equity of redemption where the period of redemption has not or had not expired,* or where a deed of trust has been given as security, *or where the sale has not or had not been confirmed,* or where deed had not been delivered, at the time of filing the petition.

"In all cases where, *at the time of filing the petition, the period of redemption has not or had not expired,* or where the right under a deed of trust has not or had not become absolute, *or where the sale has not or had not been confirmed,* or where deed had not been delivered, the period of redemption *shall be extended* or *the confirmation of sale withheld* for the period necessary for the purpose of carrying out the provisions of this section. • • •

"(o) Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings *shall not be instituted,* or if instituted at any time prior to the filing of a petition under this section, *shall not be maintained, in any court or otherwise,* against the farmer or his property, *at any time after the filing* of the petition under this section, and *prior to the confirmation*

or other disposition of the composition or extension proposal by the court:

"(1) Proceedings for any demand, debt, or account, including any money demand;

"(2) *Proceedings for foreclosure of a mortgage on land*, or for cancellation, rescission, or specific performance of an agreement for sale of land *or for recovery of possession of land;*

(3) Proceedings to acquire title to land by virtue of any tax sale;

"(4) Proceedings by way of execution, attachment, or garnishment;

"(5) Proceedings to sell land under or in satisfaction of any judgment or mechanic's lien; and

"(6) Seizure, distress, sale, or other proceedings under an execution or under any lease, lien, chattel mortgage, conditional sale agreement, crop payment agreement, or mortgage.

"(p) *The prohibitions* of subsection (o) *shall apply to all judicial or official proceedings in any court or under the direction of any official*, and *shall apply to all creditors, public or private*, and *to all of the debtor's property, wherever located. All such property shall be* under the *sole jurisdiction and control* of the *court in bankruptcy*, and subject to the payment of the debtor farmer's creditors, as provided for in section 75 of this Act."

Again, subsection (s)

"(4) • • • *If, at the time that the farmer debtor amends his petition or answer, asking to be adjudged a bankrupt, a receiver is in charge of any of his property, such receiver shall be divested of possession and the property returned to the possession of such farmer*, under the provisions of this Act. • • •"

In *Wright* v. *Union Central*, 304 U. S. 502, this court decided that *all rights of redemption* existing at the filing of a

petition under Section 75 *are preserved* and that *all proceedings* taken in a State court *subsequent* to the filing of the petition *are void.* In that case, two final State decisions had held that the farmer debtor's rights of redemption had been extinguished during the pendency of the farmer debtor proceedings under Section 75 in the bankruptcy court.

Again, on page 514 the court in its opinion says:

"The debtor has a *right of redemption* of which the purchaser *is advised,* and *until* the right of redemption *expires* the *rights* of the purchaser *are subject to the power of Congress over the relationship of debtor and creditor* and its power to legislate for the rehabilitation of the debtor. The person whose land has been sold at foreclosure sale and now holds a right of redemption is, for all practical purposes, in the same debt situation as an ordinary mortgagor in default; both are faced with the same ultimate prospect, either of paying a certain sum of money, or of being completely divested of their land."

On page 516 the opinion continues: "Any purchaser at a judicial sale must purchase *subject to the possibility of the exercise of the bankruptcy power in a manner consonant with the Fifth Amendment.* • • • Property rights do not gain any absolute inviolability in the bankruptcy court because created and protected by state law. Most property rights are so created and protected."

"*The exclusive jurisdiction* of the bankruptcy court *is so far in rem* that the bankrupt's estate is regarded as in *custodia legis from the filing of the petition*" Acme Harvester Co. *v.* Beekman Lumber Co., 222 U. S. 300. Commercial Bank *v.* Buckner, 20 How. 108.

"An attachment of the bankrupt's property after the filing of a petition and before adjudication *cannot operate to remove the bankrupt's estate from the jurisdiction of the bankruptcy court* for the purpose of administration under the Act of Congress." Acme Harvester Co. *v.* Beekman Lumber Co., 222 U. S. 300. Cameron *v.* United States, 231 U. S. 710.

Cannot Surrender Jurisdiction.

"For the court to afford the relief which the section as amended contemplates, it is necessary that the *exclusive* and *paramount jurisdiction* of the court *over* the *property* of the bankrupt *be maintained;* and there can be no question but that the provisions of subsections (n) and (o) apply as well to proceedings continued under subsection (s) as to proceedings under the other provisions of section 75. • • • And we do not think that the right to stay proceedings in the State court is precluded because a sale has taken place in foreclosure proceedings if there has been no confirmation of the sale." Bradford *v.* Fahey, 76 F. (2d) 628 (C. C. A. 4th).

In the case of *In re O'Brien*, C. C. A. 2, 78 F. (2d) 715, when the farmer debtor filed his petition under Section 75 there was pending a suit against him on promissory notes. Thereafter a judgment was taken on the notes which became, by State law, a lien upon the farmer debtor's property. The court held the lien to be void saying:

"On the face of the statute *it is entirely clear* that Congress *intended* the bankruptcy court to have *exclusive jurisdiction* over the farmer's property *from the moment he should file a petition* for relief under section 75. This is *inferentially* shown by the final sentence of subsection (e), Section 75, and is *expressly stated* in subsection (n), Section 75, • • •

• • • • • • •

"And subsection (o), Section 75, *specifically* declares that neither proceedings affecting title nor proceedings for the recovery of any debt *shall be instituted* or, if already instituted, *maintained* against the farmer or his property at *any time after the filing of the petition* and *prior to the confirmation* or other disposition by the court of the composition or extension proposal. *These provisions put it beyond debate that after the filing of the farmer's petition no creditor was to be*

permitted to better his position by litigation in another court. See Bradford *v.* Fahey (C. C. A. 4th Cir.), 76 F. (2d) 628, 637; *In re Dickinson* (D. C. Wyo.) 9 F. Supp. 227, 229; Eaves *v.* Glenn (D. C., Tex.), 9 F. Supp. 647, 648. Hence the bank's judgment improperly taken after O'Brien had filed his petition in the court below *cannot* impose *any valid lien* on the debtor's property."

In the case of *Byerly* v. *Union Joint Stock Land Bank*, C. C. A. 6 recently decided and reported 106 F. (2d) 576, the court says:

"The appellant and his farm were in the *exclusive jurisdiction* of the bankruptcy court *from the filing of his petition* on November 19, 1934 (subsection (n) above quoted; Hoyd *v.* Citizens Bank, supra, p. 107), until the petition and amended petition were dismissed on August 26, 1935.

"We think that the Bank's deed was *also void.* It was based upon the confirmation of the sale *not only unauthorized but specifically prohibited* (subsection (o)). Confirmation was essential to the validity of the Bank's Title (Hoyd *v.* Citizens Bank, supra, p. 108) *but there can be no valid confirmation of a void sale.*

• • • • • • •

"We think that appellant has never been divested of his property rights in the farm and that the bankruptcy court had exclusive jurisdiction (subsection (n)) at the time the order of disclaimer was entered."

In the above case a foreclosure sale was advertised in the State court when the farmer debtor filed his petition under Section 75. The Federal court issued a restraining order, staying the sale. Later the court modified the restraining order, permitting the sale but restraining confirmation.

The farmer debtor then amended his petition and asked to be adjudicated a bankrupt under the original Section

75 (s). When subsection (s) was held unconstitutional the petition and the amended petition were dismissed. The State court confirmed the sale and the purchaser received and recorded his deed.

After the enactment of the new subsection (s) the bankruptcy court reinstated the farmer debtor's amended petition under the present Section 75 (s). But the bankruptcy court refused to assume jurisdiction over the farmer debtor's farm upon the ground that the State court, having confirmed the foreclosure sale during the interval when all the proceedings under Section 75 had been dismissed, had completely divested the farmer debtor of his title. But, as we have seen in the above decision, the Circuit Court of Appeals in the Sixth Circuit reversed the District Court and held that even though the State court had complete jurisdiction when it confirmed the sale, *the confirmation was void because the sale was void.*

In *Hoyd* v. *Citizens Bank*, C. C. A. 6, reported in 89 F. (2d), 105, the farmer debtor filed his petition under Section 75 after foreclosure sale in the State court but before confirmation. Coincident with the filing of the petition the bankruptcy court issued an order restraining further proceedings in the State court. This restraining order was later vacated by the bankruptcy court, whereupon the State court confirmed the sale. The Circuit Court of the Sixth Circuit held that notwithstanding the vacation of the restraining order the confirmation of the sale by the State court was rendered void by the provisions of Section 75 (n) and (o). The court said:

> "We conclude that *as the sale had not been confirmed at the time of filing the petition*, appellant's equity of redemption *had not been barred*, and that it constituted 'property' which was subject to the jurisdiction of the federal court under subsection (n). The foreclosure proceedings and the proceedings for sale thereunder

were *therefore stayed* by the operation of subsection (o).

* * * * * * *

"* * * under the mandatory provisions of subsection (o), all proceedings in the foreclosure action, including sale, *were stayed after the filing* of the debtor's petition and *were of no effect.*"

"When the lien of an attachment from a state court *is annulled* by an adjudication in bankruptcy, such court *loses jurisdiction* of the property, which passes into the *exclusive jurisdiction* of the court of bankruptcy. * * *

"Where a state court which has obtained possession of property by attachment *loses its jurisdiction* by operation of a federal law, as by an adjudication in bankruptcy *which annuls* the attachment and *transfers exclusive jurisdiction* over the property to the *bankruptcy court*, the question of comity *cannot* affect such jurisdiction."

In re Tune, 115 F. 906. *Stellwagen* v. *Clum*, 245 U. S. 605.

"Bankruptcy *supersedes* an action in a state court begun *within* four months *prior* thereto by way of attachment, statutory proceedings in insolvency, or receivership for settlement and distribution of the debtor's property."

Louisville Realty Co. v. *Johnson*, 290 F. 176; *White* v. *Schloerb*, 178 U. S. 542.

In *Shadley* v. *Ludwig*, C. C. A. 6, recently decided and reported on Page 51616, C. C. H. Bankruptcy Law Service. The farmer debtor's farm was sold in a foreclosure sale a few days after the farmer debtor filed his petition under Section 75 of the Bankruptcy Act. The State court confirmed the sale. The purchaser was a stranger to both the foreclosure proceedings in the State court and to the proceedings under Section 75 in the bankruptcy court. He claimed that as an innocent purchaser for value he was unaffected by the

filing of the petition under Section 75. In dismissing the claim of the purchaser the Court said:

> "It is urged that subsection (o) does not apply to appellee because he is not the mortgagee nor a creditor of the farmer debtor but simply a third party, purchaser at the sheriff's sale. *But the statute makes no such exception*, and its terms are equally applicable to all classes of purchasers. Obviously the section cannot be mandatory as to one class of persons and directory as to another class. *The sheriff had no power to sell, and hence could not confer title on the purchaser.*"

Cases Relied Upon Below.

The Supreme Court of Wisconsin cites the following decisions of the Supreme Court of the United States as authority for its decision that a State court could divest the farmer debtor of his property after he filed his petition under Section 75 of the Bankruptcy Act: (1) *Hardt* v. *Kirkpatrick*, C. C. A. 9, 91 F. (2d) 875. (2) *In re Arend*, 8 Fed. Supp. 211. (3) *In re Lowmon*, C. C. A. 7, 79 F. (2d) 887.

We have already discussed the decision *In re Lowmon*, which in effect has been twice overruled by the Supreme Court of the United States. That erroneous decision was based upon the grounds that certain parts of Section 75 were unconstitutional. That issue has been effectively disposed of by two decisions of this Court. Whatever else the Court may have said in that decision was '*obiter dicta*' and has very little if any bearing on the issue here.

The decision in the *Kirkpatrick* case is not only not applicable because it adjudicated facts entirely different from those in the present cases, but it has in effect been overruled by *Wright* v. *Union Central*, 304 U. S. 502. That case did not deal with the farmer debtor under subsections (a) to (r) but dealt with him under Section 75 (s). Therefore it is not an authority here.

The *In re Arend* case has absolutely no application to this case and is in fact sound law but misapplied. In that case the period of redemption had expired before the petition was filed and title had passed beyond the control of the farmer debtor or the court. Therefore it is no authority whatsoever in the cases here at bar.

On Rehearing.

On rehearing the Supreme Court of Wisconsin held that the *Wright* v. *Union Central* case did not dispose of the issues here involved. It is true that it did not do this in so many words but the facts in that case are that the Union Central Life Insurance Company had been allowed to foreclose its mortgage, to have the sale confirmed, and had received a certificate of sale, and a deed in foreclosure was issued and delivered to it on July 20, 1936.

In that case the Federal District Court held that it had no jurisdiction because the property had been sold before Wright had filed his petition and that the right of redemption was not such a property right as would give jurisdiction. That decision was confirmed by the Circuit Court of Appeals of the Seventh Circuit, but that decision was reversed by the Supreme Court of the United States and jurisdiction was resumed by the District Court in accordance with the decision.

Would Cause Confusion.

The Supreme Court of Wisconsin fears that if Federal courts were to assume the sole and absolute jurisdiction in cases under Section 75 of the Bankruptcy Act that then there would be great confusion in titles. That fear is rather far fetched. This question is not for the Supreme Court of Wisconsin to determine. *Congress determined it and it accepts full responsibility.* Congress had a real issue, not a speculative one, before it when it was called upon to deal with submerged agriculture.

This same argument could have been made against setting aside transfers of real estate property made four months prior to the filing of a petition under general bankruptcy. But here there has been no great confusion. Abstractors of real estate titles invariably search the record of the United States District Court or at least obtain a certificate from the clerk.

The courts must be guided by the language of an Act of Congress and not by their fears. This Act must not be confused with State acts. It is an Act passed by the Congress of the United States on the subject of bankruptcy—passed under the grant of power given it by the Federal Constitution.

> "*Congress shall have power . . . to establish . . . uniform laws on the subject of bankruptcy throughout the United States*",

and

> "*to make all laws which will be necessary and proper for carrying into execution the foregoing powers, and all other powers, vested by this Constitution in the Government of the United States, or in any department or officer thereof.*" (U. S. Constitution, Art. I, par. 8.)

Again,

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, *shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.*" Article VI.

On the subject of bankruptcy, *the Constitution vests full and complete, not only partial, legislative power in Congress. Any State law must give way to the National law.*

That is the mandate of the Constitution. There is no limitation on this power, save and except such as may be found in the Fifth Amendment.

State Court Had Notice.

The records in both of these cases show that the State Court *had notice* of the fact that appellants' petition under Section 75 of the Bankruptcy Act *had been reinstated* on September 26, 1935 and that the order dismissing the petition on the twenty-seventh day of June, 1935, *was vacated.* (Case No. 120, R. 2. Case No. 121, R. 2.)

In spite of this notice the court proceeded and confirmed the sale on the sixteenth day of September, 1935 without notice to the appellants and in utter disregard of the sole and exclusive jurisdiction of the court of bankruptcy. While no such notice is necessary the fact is that under the law the filing of the petition is notice in itself not only to State courts but to all the world. *Yet,* in this case the State court *had actual notice.*

In *Hoyd* v. *Citizens Bank,* C. C. A. 6, 89 F. (2d) 105, the Court says:

> "Under the mandatory provisions of subsection (o) all proceedings in the foreclosure action, including sale, were *stayed* after the filing of the debtor's petition and *were of no effect.*"

In the case of *Wilcons* v. *Penn Mutual Life Ins. Co.,* C. C. A. 10, 97 F. (2d) 417, the Court says:

> "The jurisdiction of the bankruptcy court *attaches on the filing of the petition.* Thereafter its power is *exclusive and paramount* as to all the bankrupt's property not in the possession of some other court. A suit to foreclose a mortgage *is not* a proceeding in rem. Moreover, the farmer was still in possession of the 400 acres, deeds had not been issued to the purchasers, and the district judge entered an order approving the filing

of the farmer's petition. But if the farmer's interests and rights in the property had terminated, then subsection (o) provides a remedy to the true owner. • • • Whether appellees' names are in or out of the bankruptcy files and proceedings *has no effect on the jurisdiction of the bankruptcy court conferred by* subsection (n), which coupled with subsections (o) and (p) *operate as an injunction against every one unless and until lifted in the way provided by subsection* (o). Jurisdiction is the power to decide wrongly as well as rightly."

Decisions Without Jurisdiction Void.

The acts of a court without jurisdiction *are a nullity. Wright* v. *Union Central Life*, 304 U. S. 502. A court when it proceeds without jurisdiction *is not a court. Its acts are void.*

Bouvier's Law Dictionary, page 442: "Acts which are done by a court which has no jurisdiction either over the person, the cause or the process, are said to be *coram non judice.* Such acts have no validity."

13 *Corpus Juris*, "*Coram non judice*", page 1235: "When a suit is brought and determined in a court which has no jurisdiction in the matter, it is then said to be *coram nonjudice*, and the judgment is void; *so acts done by a court which has no jurisdiction either over the person, the cause, or the process, are said to be coram non judice.*"

14 *Am. Jur.*, "*Courts*", page 367, from section 167: "A universal principle as old as the law is that the *proceedings of a court without jurisdiction are a nullity* and its judgment without effect either on the person or property."

See also:

Mitchell v. *St. Maxent*, 71 U. S. 237: "Void process confers no right on an officer to sell property, and all acts done under it are absolute nullities."

Gaines v. *New Orleans*, 73 U. S. 642: "Where sales were irregular, but those who bought the property did it in good faith, and without notice, *they are not protected* except by the bar of time prescribed by the law."

Sec. 328.01, Wis. Stats.: "The Courts of this state shall take judicial notice of the statutes of the United States and of all the states and territories thereof."

Wisconsin Statutes.

Under the Wisconsin statutes title to the farm here in question was in the appellant at the time that he filed his petition under Section 75 with the Bankruptcy Court.

SEC. 278.10. FORECLOSURE. "(2) Any party may become a purchaser. But no such sale shall be made or advertised until the expiration of one (1) year from the date when such judgment is perfected; * * *"

SEC. 278.16. NOTICE AND REPORT OF SALE. "The sheriff or referee who makes sale of mortgaged premises under a judgment therefor, shall give notice of time and place of sale in the manner provided by law * * *. He shall, within ten (10) days thereafter file with the clerk of court a report of sale and shall immediately after the sale deposit with the clerk of the court the proceeds of sale * * *"

SEC. 278.17. DEED, EXECUTION AND EFFECT. "Upon any such sale being made the sheriff or referee making the same, on compliance with its terms, shall make and execute to the purchaser a deed of the premises sold * * *. Such deed or deeds so made and executed by the sheriff as above set forth, shall be forthwith delivered by him to the clerk of court to be held by the clerk until confirmation of sale, and upon confirmation thereof, the clerk of court shall thereupon pay to the parties entitled thereto or to their attorneys the proceeds of sale and shall deliver to the purchaser or purchasers at the sale such deed or deeds upon compliance by such purchaser or purchasers with the terms

of such sale and the payment of any balance of sale price to be paid."

SEC. 281.209. PERIOD OF REDEMPTION MAY BE EXTENDED. "(1) Where any mortgage upon a home, as defined in subsection (2) of section 281.201, has been foreclosed and the period of redemption has not yet expired, or where a sale is hereafter had in the case of such real estate mortgage foreclosure proceedings, now pending, or which may hereafter be instituted prior to April 1, 1939, or upon the sale of any such home under any judgment or execution where the period of redemption has not yet expired, or where such sale is made hereafter and prior to April 1, 1939, the period of redemption may be extended for such additional time as the court may deem just and equitable but in no event beyond April 1, 1940."

Conclusion.

In conclusion, as Mr. Justice Reed said in the *Wright* case:

> "The mortgage contract was made subject to constitutional power in the Congress to legislate on the subject of bankruptcies. Impliedly, this was written into the contract between petitioner and respondent. 'Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order.'"

Subsections (n), (o), (p) and (s) of Section 75 of the Bankruptcy Act *specifically and expressly* provide, *again and again*, that upon *the filing of the farmer debtor's petition the exclusive and complete jurisdiction shall be and remain in the bankruptcy court.* There is no room for construction or doubt here. The language is most emphatic.

The statute *puts no requirement* on the Federal courts to notify State courts. The filing of the petition *is notice* to them and to the world.

It is, therefore, respectfully suggested that the purported confirmation of the sale in foreclosure by the State court on September 16, 1935, was an *absolute nullity* because that court then *did not have power* to act. Consequently the farmer debtor *has not been* deprived of his property in his farm because his right of redemption has never been foreclosed. It necessarily follows that his farm is now subject to the jurisdiction of the bankruptcy court in which he filed his petition under Section 75 of the Bankruptcy Act.

We feel that the decision of the Wisconsin Supreme Court both in case No. 120 and No. 121, here under consideration, should be reversed and remanded with instruction that the State court allow proceedings in accordance with the provisions of Section 75 of the Bankruptcy Act.

Respectfully submitted,

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FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 120

ERNEST NEWTON KALB AND MARGARET KALB,
HIS WIFE,

Appellants,

vs.

HENRY FEUERSTEIN AND HELEN FEUERSTEIN,
HIS WIFE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

J. ARTHUR MORAN,
Counsel for Appellees.

INDEX.

Subject Index.

Statutes Cited.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 120

ERNEST NEWTON KALB AND MARGARET KALB,
HIS WIFE,

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HENRY FEUERSTEIN AND HELEN FEUERSTEIN,
HIS WIFE,

Appellees.

JOINT STATEMENT OPPOSING JURISDICTION.

For the sake of brevity, no additional statement of facts is here made but reference is made to the opinions of the State court attached as Exhibits A and B to the Statement as to Jurisdiction in Case No. 375 of the October Term, 1938, and Case No. 374 of the October Term, 1938, they being companion cases.

The appellees severally contend that there is no substantial Federal question presented by this appeal for the following reasons:

1. The stay provided by Section 75(n) of the Bankruptcy Act as amended August 28, 1935, 49 Statutes at Large 943, Chapter 792, is a *judicial* stay and not an automatic or

statutory one. The statute is an assertion of jurisdiction in the Federal court and the filing of a petition only serves to create rights which are grounds for a judicial stay if properly asserted. To hold that mere filing of the petition divested the State court of jurisdiction in the foreclosure case would throw the whole matter of titles into inextricable confusion. This rule is too well settled for reasonable argument.

2. In Wisconsin, the foreclosure sale is not had until the expiration of one year from the date of the foreclosure judgment. Sec. 278.10, Wisconsin Statutes.

Sec. 278.13, Wisconsin Statutes, provides in part:

> "The mortgagor • • • may redeem the mortgaged premises at any time before the sale • • •."

To hold that the State court lost jurisdiction in the foreclosure proceedings by the filing of the petition after more than one year from the date of the foreclosure decree when the period of redemption had expired or at least run for more than one year (and in this case more than two years), would be an application of the so-called Second Frazier-Lemke Act which would make it unconstitutional as it has been definitely decided that Congress has no power to extend the period of redemption after the time had begun to run.

3. The complaint affirmatively demonstrates debtor appellant's failure to pursue the proper remedy by appealing from the judgment of the State court confirming the foreclosure sale, and by debtor's discontinuance of the bankruptcy proceedings and his failure to prosecute such proceedings to a conclusion.

4. The Full Faith and Credit Clause of the Federal Constitution would be violated if the Court refused to recog-

nize the validity of the foreclosure sale and confirmation as it appears that the foreclosure decree was entered April 21, 1933, and the filing of debtor's petition under Sec. 75 of the Bankruptcy Act as amended August 28, 1935, was not until September 6, 1935, and the period of redemption had already expired or at least had begun to run more than two years prior thereto.

5. Filing of the petition under the Second Frazier-Lemke Act appears to have been solely for the purpose of delay and harassment and debtor appellant having failed to prosecute the proceedings instituted by him in the Federal court, four years having now elapsed since the date of the reinstatement of his amended petition.

Dated July 5, 1939.

J. ARTHUR MORAN,
Attorney for Appellees.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 120

ERNEST NEWTON KALB AND MARGARET KALB, HIS WIFE,

vs. *Appellants,*

HENRY FEUERSTEIN AND HELEN FEUERSTEIN, HIS WIFE,

Appellees.

Upon the foregoing Joint Statement Opposing Jurisdiction, and upon the records and files herein, the appellees by their attorney, move the Court for an order dismissing the appeal for want of a substantial Federal question, and, in the alternative, for an order affirming the judgment of the Supreme Court of Wisconsin for the reason that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Dated July 5, 1939.

J. ARTHUR MORAN,
Attorney for Appellees.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 120

ERNEST NEWTON KALB and
MARGARET KALB, his wife,

Appellants,

vs.

HENRY FEUERSTEIN and
HELEN FEUERSTEIN, his wife,

Respondents.

APPEAL FROM THE SUPREME COURT OF
THE STATE OF WISCONSIN

BRIEF OF THE RESPONDENTS

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HAMMERSMITH-KORTHEVER CO.-MILWAUKEE

INDEX

TABLE OF CASES CITED

Page

STATUTES AND TEXTBOOKS CITED

IN THE

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ERNEST NEWTON KALB and
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Appellants,

vs.

HENRY FEUERSTEIN and
HELEN FEUERSTEIN, his wife,

Respondents.

BRIEF OF THE RESPONDENTS

STATEMENT

The appellants' statement of the case is inaccurate in certain details, both as to its nature and as to the facts. Consequently, we feel constrained to re-state briefly the nature of the case and the material facts alleged in the complaint.

This appeal arises out of an action in equity instituted in the Circuit Court of Walworth County, Wisconsin, by the above named appellants. The complaint prayed for judgment cancelling a deed executed by the sheriff of Walworth County pursuant to a judgment of fore-

closure and sale. The complaint further prayed that judgment be rendered removing the respondents from possession of certain premises described in the complaint and restoring possession of said premises to the appellants herein.

The material facts alleged in the complaint will be briefly stated herein.

Prior to March 7th, 1933, the appellants executed and delivered to the respondents, a note secured by a mortgage on certain real estate owned by the appellants (R. 1).

On March 7th, 1933, foreclosure of that mortgage was instituted in the County Court of Walworth County, Wisconsin, not in the Circuit Court as stated by appellants' counsel, and judgment of foreclosure and sale was rendered on April 21st, 1933 (R. 1).

The respondent, Ernest Newton Kalb, filed a petition under the original Frazier-Lemke Act in the District Court for the Eastern District of Wisconsin on October 2, 1934, which petition was dismissed on June 27th, 1935 (R. 2). On July 20th, 1935, sheriff's sale of the mortgaged premises was had pursuant to the judgment of foreclosure and sale previously rendered by the County Court of Walworth County (R. 2).

On September 6th, 1935, the petition of the respondent, Ernest Newton Kalb, was reinstated in the Federal Court under the second Frazier-Lemke Act (U.S.C.A. Title 11, Sec. 203) (R. 2).

Pursuant to notice the respondents applied to the County Court of Walworth county for confirmation of the sheriff's report of sale on September 9, 1935, and

on September 16th, 1935 an order confirming the sale was duly entered (R. 2, 3).

On December 16th, 1935, a writ of assistance was issued by the County Court of Walworth County, Wisconsin, and pursuant to that writ the respondents were put in possession of the mortgaged premises on March 12, 1936 (R. 3).

This action was instituted in September of 1937 (R. 4), in the Circuit Court of Walworth County, Wisconsin. The respondents, in that Court, demurred to the plaintiffs' complaint (R. 4) on the ground that it did not state facts sufficient to constitute a cause of action, and the demurrer was sustained by the trial court, (R. 5). An appeal was taken to the Supreme Court of the State of Wisconsin and the Circuit Court was affirmed. (R. 6). A motion for rehearing was denied.

Thereafter an appeal was taken to this Court, which appeal was dismissed because of lack of final judgment (59 S. Ct. Rep. 707). Subsequently such proceedings were had that final judgment was rendered in the Circuit Court for Walworth County, Wisconsin, dismissing the appellants' complaint, and an appeal therefrom was taken to the Supreme Court of Wisconsin (R. 13).

From the decision of the Supreme Court of Wisconsin sustaining the lower court, this appeal is taken (R. 14).

It is stated at Page 2 of the appellants' consolidated brief that this case involved the same question of law as Case No. 121 and the decision in this case must necessarily govern the decision in the other. While both arise out of the same set of facts different principles of law are involved and the decision in one case will by no means be binding in the other.

The instant case lies on the equity side of the court and must be decided in part upon equitable considerations, while the companion case sounds in tort.

For those reasons, separate briefs have been filed in both Cases No. 120 and No. 121.

QUESTIONS PRESENTED

Counsel for the appellants state that the only question presented by the record herein is "whether or not the provisions of subsections (n), (o), (p) and (s) of Section 203, Title 11, Bankruptcy, U. S. Code, as amended by Section 203, Title 11, Bankruptcy, Supplement 4, U.S. Code, are mandatory and self-executing."

We respectfully submit that, in addition to the question suggested by the appellants, the following questions are presented for consideration, to-wit:

First. Is the Federal question presented by this record sufficiently substantial to entitle the appellant to review by this Court?

Second. Can the orders of the County Court of Walworth County, Wisconsin, be collaterally attacked as attempted in this proceeding?

Third. Does the complaint affirmatively show laches on the part of the appellants?

Fourth. Does the filing of a petition under the Frazier-Lemke Act act as an automatic stay of all proceedings in the State Courts?

Fifth. When it appears, as it does in the complaint herein, that the petitioner under the Frazier-Lemke Act has made no effort to comply with the provisions of the Act, can he assert any rights under the Act or claim any of the benefits thereof?

SUMMARY OF ARGUMENT

I.

The Supreme Court of the State of Wisconsin having based its judgment upon non-Federal grounds which adequately support that judgment, the motion of the respondents to dismiss or affirm should be granted, even though a Federal question was discussed, and, as it is claimed, erroneously decided.

II.

A demurrer admits only those facts that are well pleaded and does not admit conclusions of law.

III.

(a) This action is a collateral attack upon the orders and judgment of one court by a court having equal and concurrent, but no appellate jurisdiction.

The County Court of Walworth County, having been granted jurisdiction, by statute, of mortgage foreclosures, had the power to determine whether or not it retained jurisdiction after the filing of a petition under the Frazier-Lemke Act. Even if the decision of the court were erroneous, subsequent orders were merely voidable, not void.

(b) The settled law in Wisconsin is to the effect that where a court has acquired jurisdiction, any judgment rendered in the exercise of that jurisdiction, even if clearly erroneous, can only be tested by appeal.

(c) Failure to appeal from the orders of the County Court of Walworth County is a bar to the maintenance of this action.

(d) Counsel for the appellant has failed to distinguish between judgments and orders that are void

for a total want of jurisdiction, and those that are merely voidable because they were entered in excess of jurisdiction.

IV.

(a) A complaint in equity which shows on its face that the plaintiff is guilty of laches may be restricted by demurrer.

(b) The complaint is demurrable because it shows on its face that the appellants have been guilty of culpable negligence in failing to object to the jurisdiction asserted by the County Court of Walworth County and in failing to appeal to the proper appellate tribunal.

(c) The complaint is demurrable because of the failure of the appellant to make timely application for equitable relief. The complaint is silent as to any justification or excuse for the unwarranted and unreasonable delay in bringing this action.

V.

The filing of the amended petition, under Section 75 of the Bankruptcy Act, on September 6, 1935, did not effect an automatic stay of the foreclosure proceedings pending in the state court but at most subjected the farmer and all of his property *not in the custody or control of some other court,* to the exclusive control of the Bankruptcy Court. To hold that the mere filing of the petition, without obtaining a judicial stay, operated as an automatic stay of pending proceedings in the State Court would result in an inextricable confusion with respect to real estate titles. The language of Subsection N is an assertion of jurisdiction which, if properly made to appear, would be the basis for a judicial stay. Such has always been the rule with reference to the Bankruptcy Act.

VI.

The cases cited by the appellants are merely in support of a proposition that the Federal Court may, by injunction, either summarily or upon notice, restrain a state court from exercising jurisdiction after the filing of the petition in the Federal Court. That question is not involved in this case and the cases cited by the appellants do not support appellants' position that the statute in question is self-executing.

VII.

The complaint is demurrable for it shows an entire absence of good faith on the part of the appellants and fails to show that appellants took any steps to comply with the provisions of Section 75 during the period prior to the dismissal of the original petition and during the two years which elapsed between the filing of the amended petition and the commencement of this suit. They must be deemed to have abandoned the proceedings in Federal Court and to have waived their rights for the act cannot be converted into a sham for the purpose of gaining a procedural delay and hindering creditors.

ARGUMENT

I.

THE DECISION IN THE STATE COURT HAVING BEEN BASED UPON NON-FEDERAL GROUNDS, REVIEW MAY NOT BE HAD IN THIS COURT AND THE RESPONDENTS' MOTION TO DISMISS OR AFFIRM SHOULD BE GRANTED

In accordance with the rules of this Court, motion was made by the respondents herein to dismiss the appeal

or to affirm the lower Court on the ground that no substantial Federal question was presented.

On October 9th, 1939, this Court ordered that "further consideration of the question of the jurisdiction of this Court and of the motions to dismiss or affirm is postponed to the hearing of the cases on the merits."

Those matters which we consider purely non-Federal grounds are thoroughly discussed in that portion of our brief relating to the issues raised by the pleading and are not restated here except by reference.

The Supreme Court of the State of Wisconsin did not write an opinion in this case, either on the appeal (R. 7) or on the motion for rehearing (R. 8) stating that this case was controlled by the decision in the companion case of *Ernest Newton Kalb v. Roscoe R. Luce, et al.* (This court No. 121, Oct. Term, 1939) officially reported as *Kalb v. Luce, et al,* 228 Wis. 519, 279 N.W. 685. The ruling on the motion for rehearing is officially reported as *Kalb v. Luce,* 228 Wis. 521, 280 N.W. 725.

The opinion of the State Court on the appeal and on the motion for rehearing are, for the convenience of this Court, attached to this brief as Appendices II and III.

While the Supreme Court of the State of Wisconsin in its original decision discussed the application of the Frazier-Lemke Act, as amended, to mortgage foreclosures in Wisconsin courts (Appendix II), it nevertheless held upon non-Federal grounds that the complaint did not state a cause of action against the defendant, O'Brien (Sheriff). But upon the appellants' motion for rehearing the Wisconsin Supreme Court eliminated the Federal question entirely (Appendix III), and decided the case

upon other and non-Federal grounds. Mr. Chief Justice Rosenberry, speaking for the Court, said:

> "All that this court is called upon to do is to determine whether or not the order of confirmation was valid and that depends upon whether the county court for Walworth county had jurisdiction to make the determination. If it should hold that the mere filing of the petition divested the state court of jurisdiction the whole matter would be thrown into inextricable confusion. No one should know whether a judgment of foreclosure of a state court with an order confirming a sale thereunder was valid or void until a search had been made of the records of the federal courts.
>
> We need not consider nor discuss the question whether the congress has power to divest the jurisdiction of a state court which has once attached. That question is not presented by this record. It would seem from a consideration of sec. 75 as amended that the filing of the petition automatically operated to extend the period of redemption. It is possible that that state of facts if made to appear would make the order of the trial court erroneous but the order would be within the power of the court to make. No appeal having been taken, no showing having been made in the state court, an order of sale having been confirmed and the purchaser put in possession, the plaintiff is in no position to claim that the order of the circuit court is void."

Counsel for the respondent respectfully submit that the only conclusion that can be drawn from the language above set forth, is that the judgment and orders of the County Court, even though erroneous, were within the power of that court to make and could only be questioned by appeal to the proper appellate tribunal, and that the Supreme Court of Wisconsin ruled against the appellant on that ground.

We have fully discussed the question of collateral attack elsewhere in our brief (see pages 19 to 27 inclusive) and will not repeat our argument here. Sufficeth to say that as an elementary proposition, a judgment entered by a court having jurisdiction of cases of the kind and class of that adjudged, cannot be collaterally attacked.

The rule is well established that where the decision of the State Court is deemed to rest upon a non-Federal ground which independently and adequately supports the State Court judgment, the United States Supreme Court will not exercise jurisdiction to review, notwithstanding the raising of Federal questions upon the State Court record or the decision of those questions by the State Court. Where such an independent and adequate non-Federal ground of decision appears, review may not be had in the Supreme Court even though the State Court *also in terms purports to decide a federal question, and decides it erroneously.*

Applying the above rule to the case at bar, it seems clear to us that even though the Supreme Court of Wisconsin discussed the application and validity of the Frazier-Lemke Act, still the case is not entitled to review by this tribunal for the reason that there are ample non-Federal grounds upon which the judgment of the State Court may, and in fact must, be sustained.

Even though all of the contentions of the appellant with regard to the Frazier-Lemke Act be sustained, the remanding of the case to the State Court for further proceedings would be useless and profitless, for the State Court could thereafter enter the same judgment upon the non-Federal grounds alone.

The questions of collateral attack and of laches are both purely non-Federal questions and are not proper matters for review by this Honorable Court. And this is true even though the State Court discussed, and as it is claimed erroneously decided a question relating to a Federal statute.

In the case of *Enterprise Irrigation District v. Farmers Mutual Canal Company,* 243 U.S. 157, 164; 37 S. Ct. 318; 61 L. Ed. 644, the State Court decided in favor of the respondent upon two grounds, first, that the 14th amendment relating to "due process and equal protection" had not been violated; and second, that the defense of estoppel in pais was well grounded.

This Court said:

> "The first was plainly a Federal question and the other was plainly non-Federal. Both were resolved in favor of the Canal Company * * * Thus we are concerned with a judgment placed upon two grounds, one involving a Federal question and the other not. *In such situations our jurisdiction is tested by inquiring whether the non-Federal ground is independent of the other and broad enough to sustain the judgment. Where this is the case, the judgment does not depend upon the decision of any Federal question and we have no power to disturb it.* (Italics ours)

To the same effect are the following cases: *Hammond v. Johnson,* 142 U.S. 73; 35 L. Ed. 941; 12 S. Ct. 141. *Eustis v. Bolles,* 150 U.S. 361; 37 L. Ed. 1111; 14 S. Ct. 131.

It seems to us obvious from the whole record that the State Court reached its ultimate conclusions upon the principal ground that the orders of the County Court could not be attacked collaterally.

In any event it is clear from the record that the State Court could and doubtless would, if the case were remanded, rule against the appellant on that and other non-Federal grounds. Sufficient reasons therefor exist for either dismissal or affirmance by this Court.

In *Murdock v. Memphis,* 20 Wall. 590, 634, 635; 22 L. Ed. 429, this Court said:

> "But when we find that the State Court has decided the question erroneously, then to prevent a useless and profitless reversal, which can do the plaintiff in error no good, and can only embarrass and delay the defendant, we must so far look into the remainder of the record so as to see whether the decision of the federal question alone is sufficient to dispose of the case, or to require its reversal; or on the other hand, whether there exist other matters in the record actually decided by the State Court which are sufficient to maintain the judgment of that Court, notwithstanding the error in deciding the federal question. In the latter case the court would not be justified in reversing the judgment of the State Court."

In view of the fact that the record establishes ample non-Federal grounds upon which the State Court could and did decide the case adversely to the appellants, respondents' motion to dismiss or affirm, should we respectfully submit, be granted.

II.

DEMURRER ADMITS ONLY FACTS WELL PLEADED

Throughout the various causes of action, appear such language as "arbitrarily, wrongfully and unlawfully," and "while the exclusive jurisdiction of the person of the

plaintiff and of all of his property, both real and personal, was in the United States District Court," and "the acts * * * were done and performed in collusion."

This language and these allegations are but conclusions of law, are not well pleaded, and are not admitted by demurrer.

Aaron v. Wausau, 98 Wis. 595.
Coughlin v. Milwaukee, 227 Wis. 357.
49 *C. J.* 438.

III.

A JUDGMENT RENDERED BY ANY COURT WITHIN ITS JURISDICTIONAL SCOPE CANNOT BE ATTACKED IN A COLLATERAL PROCEEDINGS

(a) These Proceedings Are In Effect a Collateral Attack Upon the Orders Issued by the County Court of Walworth County and Cannot be Maintained.

The County Court of Walworth County, by virtue of the legislative enactment which created it, has concurrent jurisdiction within prescribed limits with the Circuit Court of Walworth County, wherein these proceedings were instituted (See Appendix I).

Among those matters in regard to which the County Court has concurrent jurisdiction with the Circuit Court, are the foreclosures of real estate mortgages and all proceedings in reference thereto.

As appears by the complaint herein, the County Court acquired jurisdiction of the person of the defendant and the real estate in question by the institution of foreclosure

proceedings which in due course matured in a judgment of foreclosure on April 21, 1933. Pursuant to that judgment sale was had on July 20, 1935. These were matters properly within the jurisdiction of the County Court, and up to that point no conflict or question of jurisdiction had arisen. Following the sale and prior to the confirmation appellants' petition in the Federal Court was reinstated. Upon the application for confirmation the County Court was authorized under long established rules of law, and in fact required to determine whether the jurisdiction of that court was completely terminated. The Judge thereof, in the exercise of his judicial duty, decided that the County Court could retain jurisdiction and granted the order prayed for.

The appellants herein now institute an action in the Circuit Court of Walworth County, a court having equal, but no greater jurisdiction, and no appellate jurisdiction over the County Court, collaterally attacking the order issued by the County Court.

It is clear that in order for the respondent to maintain his action and prevail in his appeal, the Circuit Court must find the orders referred to were utterly void.

We respectfully submit that even if that Court were to hold that the Judge of the County Court acted in excess of his jurisdiction, the orders complained of are erroneous and voidable, not void. No appeal having been taken within the statutory period, the orders complained of are and must be free from collateral attack.

It is said in *Vol. 1, Freeman on Judgments,* P. 718-719, that:

> "If the circumstances which give rise to the jurisdiction do not exist in a particular case the authority to act does not arise. But the question as to whether

> or not they do in fact exist is a matter primarily for the court whose powers are invoked, and it has jurisdiction to examine and determine whether the particular application is within or beyond its authority. Its decision in this respect is itself the exercise of a power conferred by the pleading or other act invoking its jurisdiction, and if such decision is incorrect, whether because of lack of evidence or for any other reason, it is none the less binding upon the parties *unless and until set aside on appeal or by some other proceeding for that purpose. For jurisdiction to decide includes power to decide erroneously and to make the decision bind collaterally.*" (Italics ours)

The question as to whether or not a judgment rendered by a Court upon matters within its jurisdictional scope is subject to collateral attack has been frequently considered by this Honorable Court.

In *Bradley v. Fisher*, 13 Wall. 335, 20 L. Ed. P. 646, the Court observed that a distinction must be observed between "excess of jurisdiction" and the "clear absence of all jurisdiction" over the subject matter of the controversy.

Mr. Justice Field said:

> "Where jurisdiction over the subject matter is invested by law in the judge or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend."

The court, by way of illustration pointed out that if a court having only probate powers were to issue a warrant for a criminal offense, it would be acting entirely without jurisdiction and would be liable to respond in

damages for the exercise of a usurped authority. But that on the other hand if a judge of a criminal court were to proceed to the arrest of a defendant for the commission of a crime committed outside of his district, no liability would fall upon him for such an Act, although it was clearly in excess of his jurisdiction.

It is contended in this case that the County Court erred in holding that it had jurisdiction after the filing of the petition in the Federal Court.

A case squarely in point and supporting our contention that the orders of the County Court cannot be collaterally attacked is *Dowell v. Applegate*, 152 U.S. 327; 14 Sup. Court, Rep. 611, 38 L. Ed. 463. Therein a judgment had been rendered in a District Court. The judgment was collaterally attacked on the ground that no diversity of citizenship existed and was vacated by the Supreme Court of the State of Oregon.

On appeal to the Supreme Court of the United States, Mr. Justice Harlan said:

> "It is claimed that the ground on which the Federal Court assumed jurisdiction was insufficient in law to make this case one arising under the laws of the United States. But that was a question which the Circuit Court of the United States was competent to determine in the first instance. *Its determination of it was the exercise of jurisdiction,* its determination of that matter was conclusive upon the parties before it, and could not be questioned by them or *either of them collaterally,* or otherwise *than on writ of error or appeal* to this court." (Italics ours)

The cited case presents precisely the same situation as the case now before the Court. Even if it be found that the County Court of Walworth County erred in the exer-

cise of its jurisdiction, yet its determination of that question was conclusive upon the appellant herein and could only be questioned by appeal therefrom.

(b) The Settled Adjudications of the Supreme Court of the State of Wisconsin are in Strict Conformity with the Position Taken by the Respondents on the Question as to Whether or not the Orders in Question may be Collaterally Attacked.

The law is also well settled in Wisconsin that an order or judgment issued or entered by any Court in excess of its jurisdiction is voidable, not void, and cannot be attacked except by appellate proceedings in a court having appellate jurisdiction.

A case arising out of a plexus of facts strikingly similar to the matter now before the Court is *Johnson v. Brewers Fire Ins. Co.*, 51 Wis. 570; 8 N.W. 297, in which a Michigan Court, although all of the necessary papers in the form required by law had been duly filed for that purpose, refused to remove a cause to the District Court where a diversity of citizenship clearly existed. The defendant refused to proceed further, a default judgment was rendered against him by the Michigan Court and sued on in Wisconsin. On the trial in Wisconsin, the defendant contended that the Michigan judgment was absolutely void on the theory that it had been rendered after that court had been completely divested of any jurisdiction over the cause.

The Court held that the Michigan judgment was voidable only and could not be attacked in a collateral proceedings:

> "Mere error in the proceedings of the state court cannot be corrected by this court, or received

here, for the obvious reason that we have no revisory power over that court * * * We hold that when the case is within the Act of Congress and an application in proper form for its removal is made, it is the duty of the state court to accept the petition and bond, and proceed no further in the suit. This is the mandate of the statute. But if the state court declines to relinquish its jurisdiction and proceeds to judgment such judgment is not void, but merely erroneous. Until it is reversed or set aside in a proper manner by an appellate court, it is valid and must be respected; certainly in a collateral proceeding."

The general rules established by the foregoing decision have been followed and affirmed from time to time by the Supreme Court of the State of Wisconsin.

The clean-cut but often misunderstood distinction between an absolute want of jurisdiction and an act in excess of jurisdiction has been fully preserved. The former applies to an act of judgment performed in a matter where the court or judge so acting has absolutely no jurisdiction over the proceedings or the parties before him, and under no set of facts would have the power to act. The latter applies to an act or judgment done by a judge or a court in connection with a cause of action, the subject matter of which falls within that class and kind of cases, the jurisdiction of which is vested in that particular court.

Approval of and extensive elaboration of those rules of law will be found in *State ex rel Fowler v. Circuit Court*, 98 Wis. 143, 73 N.W. 788; *Comstock v. Boyle*, 134 Wis. 613, 114 N.W. 1110; *In re Clark*, 135 Wis. 437, 115 N.W. 387; *Harrigan v. Gilchrist*, 121 Wis. 127, 99 N.W. 909, and *in re Rice's Will*, 150 Wis. 401, 136 N.W. 956, where a court of probate attempted to exercise civil jurisdiction.

The Court held in the last cited case that whether a judgment is jurisdictionally bad for judicial error instead of for excess of power, turns on whether the court had jurisdiction of such subjects as the one deliberated upon. So that when, as in this case, a judge situated as was the respondent, Luce, has acquired full jurisdiction of the cause, any judgment rendered in the exercise of that jurisdiction, even if clearly erroneous, can only be tested by appeal. This is true even though the error was committed as is claimed here, by retaining jurisdiction after jurisdiction had been acquired by another tribunal.

It is not for this Court to decide in passing upon this phase of the case, whether the District Court acquired jurisdiction upon the reinstatement of the appellants' petition. It is rather for this Court to decide whether the County Court of Walworth County had jurisdiction of the person of the respondents and the subject matter of the action prior to the time of reinstatement of the petition.

We respectfully submit that it is clear from the face of the complaint that the County Court had such jurisdiction, and if that Court erred in determining whether it had or had not lost jurisdiction it was mere error, assailable only by appeal.

(c) The Complaint Affirmatively Demonstrates a Failure to Pursue the Proper Remedy.

It is axiomatic that any person who claims to have certain legal rights must avail himself of those rights promptly, and without delay move for their exoneration.

The appellants allege in their complaint that the County Court of Walworth County erroneously exercised its jurisdiction in confirming the sheriff's sale in a mort-

gage foreclosure in which they were defendants and in placing the purchaser at the sheriff's sale in possession under a writ of assistance.

The appellants admit by allegations in their complaint that notice of the proceedings complained of were duly served upon them and that they had due notice of the pendency and maintenance of such proceedings. Both the order confirming the same and the order granting the writ of assistance were appealable orders.

If the appellants felt that they had been aggrieved by either of those orders, or that the orders were issued without authority, or contrary to law, it was their right and their duty to appeal therefrom to the Supreme Court of the State of Wisconsin within the time fixed by the Statutes of that State.

On September 16, 1935, and on December 16, 1935, the day on which the order confirming the sale was entered, the time within which an appeal must be taken was limited to one year by Section 274.01 of the Wisconsin Statutes of 1935, the pertinent portion of which reads as follows:

> "The time within which a writ of error may be issued or an appeal taken to obtain a review by the Supreme Court of any judgment or order in any civil action or special proceeding in a court of record is limited to one year from the date of entry of such judgment or order * * *."

The complaint in this case is barren of any allegation that such an appeal was taken.

Or, if the appellants believed, as they allege in their complaint, that the exclusive jurisdiction of the appellants' property, real and personal, was vested in the United States District Court for the Eastern District of

Wisconsin, or that the jurisdiction of the State Court previously acquired had been terminated or superseded by the Federal Court, the burden rested upon them to assert those rights promptly and expeditiously. Upon them was the burden to make due application to the Federal Court for a judicial stay enjoining the State Court from exercising any further jurisdiction.

Instead of so doing, it affirmatively appears that the appellants, with full knowledge that an application for confirmation of sale had been made, with full knowledge that application for a writ of assistance had been made, and in spite of the fact that possession of the real estate in question had been delivered to the purchaser on March 12, 1936, stood idly by and in no wise questioned the jurisdiction of the State Court until they instituted this suit in September, 1937, approximately two years after the issuance of the order confirming the sheriff's sale.

Despite the fact that three courses were open to them, to-wit: first, an appeal from the order of the State Court; second, an application for a stay of proceedings in the State Court, and third, an application for a stay of proceedings in the Federal Court, none of these were pursued and the complaint affirmatively demonstrates these facts.

We respectfully submit that the complaint is demurrable for these reasons, if for no other.

(d) Counsel for the Appellants Fails to Distinguish Between Judgments and Orders That are Void and Those That are Merely Voidable.

At pages 22 and 23 of appellants' brief authorities are therein cited in support of the appellants' position

that the acts of the County Court were utterly void. The authorities cited merely hold that where a court has jurisdiction of the person or subject matter before him, and acts in a matter of a kind and class over which that court cannot entertain jurisdiction, the resulting judgment is void.

For example in *Mitchell v. St. Maxent*, 71 U.S. 237, 18 L. Ed. 327, an execution had been issued after the death of the judgment debtor, in clear violation of the express language of the state statute requiring substitution of the parties defendant. It would require no extended argument to demonstrate that the Court was clearly acting without jurisdiction, there being no facts or circumstances under which the court could properly exercise jurisdiction.

And in *Gaines v. New Orleans*, 73 U.S. 642, 18 L. Ed. 951, also cited by the appellant, an executor sold lands after his authority so to do had expired under the laws of the State of Louisiana. This court held that the sale was void, and rightfully so as, under no theory, could the court have entertained jurisdiction after the expiration of the statutory period.

But we do not find in the appellants' brief any cases holding that where a court has acquired jurisdiction, it is deprived of the power to adjudicate and determine whether or not that jurisdiction has been terminated by the intervention of some other circumstance, for, as is stated in *Wilcons v. Penn Mutual Life Insurance Company*, 91 Fed. 417, cited at pages 21 and 22 of the appellants' brief, the "jurisdiction is the power to decide wrongfully as well as rightly."

IV.

THE COMPLAINT FAILED TO STATE A CAUSE OF ACTION FOR EQUITABLE RELIEF

(a) An Insufficient Complaint in Equity May be Reached by Demurrer.

This action was instituted by the appellants in equity praying for cancellation of a sheriff's deed. The law is well established that when the complaint affirmatively demonstrates on its face that the plaintiff has been guilty of laches, the defendant may resist it by demurrer.

Speidel v. Henrici, 120 U.S. 377, 30 L. Ed. 718, 7 S. Ct. 610.

19 Am. Jur., P. 221, Par. 309.

(b) The Complaint Affirmatively Demonstrates on its Face That the Appellants Have Been Guilty of Laches by Failing to Present Their Defense or to Appeal from the Judgment of the County Court for Walworth County.

This action was instituted by the plaintiffs in the Circuit Court for Walworth County, Wisconsin, asking for relief in equity, to-wit: the cancellation of a sheriff's deed and for the restoration of possession of certain real estate.

The allegations of the complaint affirmatively show that on September 16, 1935, in an action for foreclosure of a mortgage in which these appellants were defendants, an order was entered confirming the sheriff's report of sale (R. 23). The complaint further shows that on December 16, 1935, an order for a writ of assistance was issued by that Court and pursuant to that order the

appellants were removed from the premises in question, and the respondents placed in possession on March 12, 1936 (R. 3).

This action was commenced by the service of a summons and complaint on September 10, 1937, nearly two years after the order complained of, and approximately eighteen months after the appellants were removed from the premises described in the plaintiffs' complaint herein. The complaint is barren of any allegations justifying, explaining or excusing appellants' delay in the commencement of this action, or their failure to oppose the granting of the orders complained of.

It is a long and firmly established rule of law that he who seeks equitable relief must exercise reasonable diligence in seeking redress. Nor will a court of equity relieve a man from his own culpable negligence.

In *1 Eq., Juris,* Par. 381, Judge Story states in part as follows:

> "If a court of equity is asked to give relief in a case not fully remediable at law, or not remediable at all at law, then it grants it upon its own terms and according to its own doctrines. It gives relief only to the vigilant and not to the negligent; to those who have not been put upon their diligence to make inquiry, and not to those who, being put upon inquiry, have chosen to omit all inquiry, which would have enabled them at once to correct the mistake, or to obviate all ill effects therefrom. *In short, it refuses all its aid to those who, by their own negligence, and by that alone, have incurred the loss, or may suffer the inconvenience.*" (Italics ours)

This general rule has been frequently applied by this Honorable Court. In *Cragin v. Lowell,* 109 U.S. 194, 3 Sup. Ct. Rep. 132, 27 L. Ed. 903, where an action was

brought in equity to set aside a judgment on the ground that the residence of the parties had been falsely stated, so as to bring the matter before the Federal Court, the Court said:

> "It is quite clear that the bill in equity was rightfully dismissed, because it contains no allegation that Cragin did not know, before the judgment against him in the suit at law, that the plaintiff in that suit alleged that he was a citizen of Louisiana. If he did then know it, he should have appeared and pleaded in abatement; and equity will not relieve him from the consequence of his own negligence."

In *Creath's Adm. v. Sims,* 5 How. 192, 12 L. Ed. 111, Mr. Justice Daniel said:

> "A court of equity will never be called into activity to remedy the consequences of laches or neglect, or the want of reasonable diligence. Whenever, therefore, a competent remedy or defense shall have existed at law, the party who may have neglected to use it will never be permitted here to supply the omission, to the encouragement of useless and expensive litigation, and perhaps to the subversion of justice."

And in *Kibbe v. Benson,* 17 Wall. 624, 21 L. Ed. 741, it was stated that:

> "If the party seeking in equity to set aside a judgment, could have defended the suit, but allowed judgment to go by his own neglect, he cannot have relief in equity for a matter which he might have availed himself of at law."

The obvious application of the rules expounded by the cited cases is clearly apparent. The jurisdictional matters alleged as a basis for the maintenance of this action were available to the appellants as a defense to the proceedings complained of in the County Court of

Walworth County. It was appellants' duty to assert them seasonably and to appeal from any ruling adverse to them.

The complaint shows on its face that the appellants failed to do either and hence we submit the complaint is demurrable.

(c) The Complaint is Also Demurrable Because of Appellants' Delay in Instituting This Action After he Became Aware of the Existence of the Facts Complained of.

It is a well established rule of law that he who seeks the aid of a court of equity must make timely application therefore. No specific rule has ever been laid down as to what period of time must elapse in order to bar the party seeking relief.

Walloch v. Washkowiak, 189 Wis. 491, 207 N.W. 286, was a case where the plaintiff sought rescission of a contract for exchange of a farm for town property on the ground of fraud. The lower court found there had been actionable fraud and rendered judgment for rescission. The action for rescission was commenced sixteen months after the fraud was discovered. Upon appeal, the lower court was reversed upon the ground that the plaintiff was guilty of laches in instituting the suit in equity.

The Court said:

> "When a party to such a transaction has had brought home to him the fact that the party in whom he placed trust and confidence, and upon whose statements he relied, has proved false to such trust and unworthy of relief in material matters, then there springs into existence the duty on the part of

a person so learning of such breach to act promptly if he desires assistance from a court of equity to place him in the position he was in prior to the alleged fraud. A delay in acting promptly upon such discovery forecloses him from the equitable remedy of rescission which is conditional upon prompt diligence on the part of a defrauded person. It is not intended that one may close his eyes as to certain material information brought home to him as to a fraud and breach of confidence, and then claim the right to long afterwards open them as to such prior disclosed facts, and subsequent discovery of other details of a fraud which, if perpetrated at all, was at the time of the original transaction and then, at such later discovery and time, elect to rescind for such fraud."

Also in *Schulteis v. Trade Press Pub. Co.*, 191 Wis. 164, 210 N.W. 419, the plaintiff asked equitable relief from a judgment alleged to have been obtained by fraud and upon perjured testimony. The action was instituted eleven months after the alleged perjury became known to the plaintiff.

The Court held:

"The rule is well settled that the fact that a judgment is obtained by perjury is sufficient ground for equitable relief. But it is equally well settled that such relief will not be granted to one who is guilty of inexcusable neglect in asserting his right to such relief. Plaintiff's delay of approximately eleven months after personal service of process upon him, without the suggestion of any excuse for such delay, warranted, the court in finding plaintiff guilty of such inexcusable neglect as to bar his right to equitable relief."

We respectfully submit that the rules set forth in the cases cited are applicable here.

The complaint being silent as to any justification or excuse for the unreasonable and unwarranted delay in bringing the action, the demurrer interposed is good and ought to be sustained.

V.

THE FILING OF THE AMENDED PETITION UNDER SECTION 75 OF THE BANKRUPTCY ACT DID NOT EFFECT AN AUTOMATIC STAY OF PROCEEDINGS THEN PENDING IN THE STATE COURT

It is contended by the appellants that the mere filing of a petition in the Federal Court automatically stayed all proceedings then pending in the State Court. We are not unmindful of the fact that some of the Federal Circuits have so held. In others it has been held that the proceedings in the State Court are stayed only when the proper order is issued in the Federal Court. Some circuits have held that such an order can be issued summarily. *In re Price*, 16 Fed. Supp. 836. This Court has not passed upon the question.

It is our contention that Section 75 (Title 11, U.S. C.A. Sec. 203) provides for a judicial stay when the proper facts are made to appear and that the filing of the petition does not automatically stay proceedings already instituted and pending in the State Court.

We respectfully submit that Section 75 is a part of the general Bankruptcy Act and that its provisions must be construed in the light of established principles and adjudications laid down by the courts in the past.

Counsel is not unmindful of that portion of Subsection N of Section 75 (Title 11, U.S.C.A. Sec. 203-N) of the Bankruptcy Act which reads as follows:

> "The filing of a petition shall immediately subject the farmer and all his property, wherever located, for the purpose of this section to the exclusive jurisdiction of the Court. * * * "

But from a reading of the entire section it is clear that it was not intended that the mere filing of a petition would act as a stay of proceedings then pending in a State Court.

Subsection S(2) Section 75 provides as follows:

> "When the conditions set forth in this section have been complied with, the Court shall stay all judicial or official proceedings in any court for a period of three years."

Had Congress intended that the Bankruptcy Court was to be vested with exclusive jurisdiction upon the mere filing of a petition, and that such filing amounted to a stay of all other proceedings instanter and without any other affirmative action, no reason would exist for a stay at a subsequent stage in the proceedings.

It has been stated in dealing with the bankruptcy law that the filing of a petition in bankruptcy operates to invest the bankruptcy court with exclusive jurisdiction over controversies relating to property in the possession of the bankrupt at the time of bankruptcy of which he claims the ownership. *Ex parte Baldwin,* 291 U.S. 610, 78 L. Ed. 1020, 54 S. Ct. 551, 6 Am. Jur. P. 531, Par. 25. Yet this seemingly decisive language has been modified by later decisions of this Honorable Court:

> "The doctrine has been limited by later decisions of the Supreme Court (U.S.) in which it is adjudged

applicable only to parties who have no substantial claim of lien upon, or title to, the property of the bankrupt and not to those who have such claims of existing liens or titles when the petition in bankruptcy is filed. In reality, the filing is neither a caveat nor an attachment; it creates no lien. It may, perhaps, better be said that the filing of the petition *is an assertion of jurisdiction with a view to the* determination of the status of the bankrupt and a settlement and distribution of his estate. Actual possession by the bankruptcy court is an indispensable condition of its exclusive jurisdiction." (Italics ours). Vol. 6, *Am. Jur.* P. 532.

To the same effect is *Straton v. New*, 283 U.S. 318, 75 L. Ed. 1060, 51 S. Ct. 465 in which Mr. Justice Roberts said:

"The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate."

And in *6 Am. Jur.* at P. 535 it is said:

"Bankruptcy proceedings do not, merely by virtue of their maintenance, terminate an action already pending in a State Court, to which the bankrupt is a party, or deprive the Court of jurisdiction in such case especially where the Court of jurisdiction of both the subject matter and the parties has been acquired by the State Court before the filing of the petition in bankruptcy."

It is clear therefore, that the term "exclusive" as it has been applied in the administration of the bankruptcy law, has not been construed as divesting the State Court of jurisdiction acquired prior to the filing of the petition in bankruptcy but only as an assertion of jurisdiction.

That this is the true intent of Section 75 we submit, is further demonstrated by the last sentence of Subsection N of that Section, which reads as follows:

> "In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the courts, the title, powers and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition, asking to be adjudged a bankrupt, was filed with the clerk of court or left with the conciliation commissioner for the purpose of forwarding same to the clerk of of court."

There are urgent reasons why a bankrupt desiring a stay of proceedings in the State Court should be required to ask for and obtain a stay in either the Federal or State Court. No judicial problem is more vexatious, nor more difficult of discernment than questions of jurisdiction particularly between the State and Federal Courts. Does not the orderly administration of justice require that before a State Court is ousted of jurisdiction by a Federal Court or vice-versa, that a magistrate make and enter an order to that effect and cause it to be served upon all interested persons?

Property rights and titles to lands are invariably involved in proceedings under the Bankruptcy Act. If State Courts are automatically divested of jurisdiction by the mere filing of a petition in bankruptcy, uncertainty and confusion must inevitably follow.

In this connection Mr. Chief Justice Rosenberry, speaking for the Supreme Court of the State of Wisconsin (See Appendix II) said:

"It may be conceded that the filing of the petition in the federal court created certain rights which the plaintiff in this action might have asserted either in the federal court or in the state court. However, the plaintiff failed to assert such rights either in the federal or state court as has already been stated. All that this court is called upon to do is to determine whether or not the order of confirmation was valid and that depends upon whether the county court for Walworth County had jurisdiction to make the determination. If it should be held that the mere filing of the petition divested the state court of jurisdiction the whole matter would be thrown into inextricable confusion. No one would know whether a judgment of foreclosure of a state court with an order confirming a sale thereunder was valid of void until a search had been made of the records of the federal courts.

We need not consider nor discuss the question whether the congress has power to divest the jurisdiction of a state court which has once attached. That question is not presented by this record. It would seem from a consideration of sec. 75 as amended that the filing of the petition automatically operated to extend the period of redemption. It is possible that that state of facts if made to appear would make the order of the trial court erroneous but the order would be within the power of the court to make. No appeal having been taken, no showing having been made in the state court, an order of sale having been confirmed and the purchaser put in possession, the plaintiff is in no position to claim that the order of the circuit court is void.

We adhere to our former determination that the provisions of sec. 75 were not intended to provide

for a statutory stay but to create rights when properly asserted are grounds for a judicial stay." (Fols. 39-73).

(Note: The words "circuit court" in the last sentence are obviously in error. The order referred to by Chief Justice Rosenberry was issued by the County Court of Walworth County, a court having concurrent powers with the Circuit Court.)

We submit that a study of the entire Act at most, leads to the construction that the filing of the petition subjects the farmer and all his property not in the custody and control of some other Court, to the exclusive jurisdiction of the Bankruptcy Court.

VI.

THE CASES CITED BY THE APPELLANTS IN SUPPORT OF THEIR CONTENTION THAT SECTION 203 IS SELF-EXECUTING DO NOT APPLY

At pages 10, 11 and 13 of the appellants' brief, there will be found a number of United States Supreme Court decisions in support of appellants' contention that the statute in question is self-executing, and in support of that contention assert that the adjudications relating to the general bankruptcy law must control. It is true, as we pointed out elsewhere in our brief, that the Supreme Court of the United States has always held that Bankruptcy Courts have exclusive jurisdiction of the property of the bankrupt from the time of filing the petition.

We are also familiar with the rule oft-times repeated, that "the filing of the petition is a caveat to all the world and in fact an attachment and an injunction".

But that case and the other cases cited by the appellants are *in support of the proposition that the Federal Court may, by injunction either summarily or upon notice, restrain a state court from exercising jurisdiction after the filing of the petition in the federal court.* In the case of *May v. Henderson,* 268 U.S. 111, 69 L.Ed. 870, this court said:

> "In consequence any person acquiring an interest in property of the bankrupt after the filing of a petition with notice of it, may be directed to surrender the property thus acquired by summary order of the bankruptcy court."

And in *Isaacs v. Hobbs Tie & Timber Co.,* 282 U.S. 734, 75 L.Ed. 645, the Court after repeating the "exclusive jurisdiction" rule and that exercise of that jurisdiction forbids interference by state courts, also said "as mortgaged property ordinarily lies within the district in which the bankruptcy court sits, and the mortgagee can consequently be served with its process, the procedure usually followed is for that court to restrain the institution of foreclosure proceedings in any other. Where the land lies outside the limits of the district in which the bankruptcy court sits, ancillary proceedings may be instituted in the District Court of the United States for the district in which the land is, and an injunction against foreclosure issued by the court of ancillary jurisdiction."

And in *Gross v. Irving Trust Company,* 289 U.S. 342, 77 L.Ed. 1243, cited at page 10 of the appellants' brief, in a case involving the question of whether or not a state court had the power to fix compensation of state receivers and their counsel after bankruptcy in the Federal Court had intervened, this Court held that bankruptcy courts have exclusive jurisdiction and that its possession

and control cannot be affected by other proceedings, but the court further said:

> "Nevertheless, due regard for comity, which means, in this connection, no more than judicial courtesy between the courts undertaking to deal with the same matter—would suggest that ordinarily the trustee in bankruptcy might well be instructed by the bankruptcy court, before taking final action, to request the state court to recognize the exclusive jurisdiction of the former and set aside any orders already made conflicting therewith, as was done with good results in the case of Re Diamond, supra (C. C.A. 6th) 259 Fed. pp. 72, 75, 44 Am. Bankr. Rep. 268."

And in *Acme Harvester Company v. Beekman*, 222 U.S. 300, 56 L. Ed. 209, cited by appellants at page 13 of their brief, the question involved was whether or not the Federal Court had the power to restrain a state court from pursuing an action in debt instituted after the filing of a petition in bankruptcy. This court, in discussing the rule said:

> "The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate."

We respectfully submit therefore that the authorities cited by the appellants do not support their position and that the general rule in bankruptcy matters is that the filing of a petition in a bankruptcy court does not ordinarily and without notice suspend the power of all other courts to act, but merely is an assertion by the Federal Court of its jurisdiction, with a view to a determination of the status of the bankrupt and a settlement and distribution of his estate. The assertion of jurisdiction we contend, must be exercised by an injunctional order.

VII.

THE COMPLAINT AFFIRMATIVELY DISCLOSES A LACK OF GOOD FAITH ON THE PART OF THE APPELLANT OR A COMPLIANCE WITH THE PROVISIONS OF SECTION 75

The complaint alleges that the original petition was filed by the appellants in the District Court of the United States for the Eastern District of Wisconsin on the 2nd day of October, 1934. It was dismissed on June 27th, 1935, and subsequently was reinstated on the 6th day of September, 1935.

The complaint, however, is barren of any allegation that a plan of composition was submitted, or that it was accepted or denied, or any report submitted by the Commissioner. The complaint is likewise barren of any allegation that the appellants have been adjudicated as bankrupt in accordance with Section 75(s). (Title 11, U.S.C.A. 203-s)

Although nearly eighteen months elapsed from the date the original petition was filed before their possession of the real estate was disturbed, and nearly three years elapsed from the date of filing and the commencement of this action, the complaint shows that the appellants did nothing to comply with the terms of the Act. We submit, therefore, that they must be deemed to have abandoned the proceedings in the Federal Court and to have waived and surrendered any rights the filing of the petition may have invested in them.

The law in question, the Frazier-Lemke Act, was not enacted by the Congress of the United States for the mere purpose of providing a means by which a debtor

unwilling, or unable to meet his obligations could prevent his creditors from pursuing their legal remedies. It required the debtor to seasonably take a definite course of action to the end that one of two results should be reached, either a composition, or, if that was impossible, an adjudication in bankruptcy.

It is stated in *Vol. 8, C. J. S.*, P. 1750, Par. 808, that:

> "One seeking benefits provided by the Act, after initiating the procedure, must carry the burden of pursuing the various steps provided diligently, honestly, in good faith and without unnecessary delay."

The Federal Courts, in discussing Section 75, have uniformly held that:

> "The submission of an equitable, feasible and good-faith proposal of compromise or extension on the part of the debtor is a condition precedent to his right to proceed further under the provision of Section 75 of the Bankruptcy Act."
>
> *In re Alatalo*, 26 F. Supp. 276.

And in *Baxter v. Savings Bank of Utica*, N. Y. 92, Fed. (2nd) 404, the Court said:

> "A good-faith effort to compromise with creditors is a prerequisite to extension relief in agricultural composition proceedings."

To the same effect is the case of *Pearce v. Coller*, 92 Fed. (2nd) 237, where it was held that a farm debtor who did not comply with statutory requirements relative to composition and plan of extension, was not entitled to relief under the Act.

And in *re Henderson*, 100 Fed. (2nd) 820, it was said:

> "A proceeding for composition or extension of debts may not be converted into a sham for the pur-

pose of gaining whatever the debtor wishes by way of procedural delays and hindrances to creditors where no legitimate purpose of the act authorizing such proceedings will be served."

The complaint, it appears to us, affirmatively demonstrates a complete and absolute lack of "good faith" on the part of the appellants and the complaint is rendered demurrable for that reason, in addition to the other grounds relied upon by the appellants.

CONCLUSION

Counsel for the respondents respectfully submit that in view of the fact that the record shows that the Supreme Court of Wisconsin based its judgment upon a non-Federal ground broad enough to support that decision, the motion of the respondents to dismiss or affirm should be granted.

We further contend that the decision of the Supreme Court of Wisconsin should be affirmed for the following reasons:

First, because this action is a collateral attack upon the orders of a court of equal and concurrent jurisdiction.

Second, because the complaint affirmatively demonstrates that the appellant is guilty of laches.

Third, because the complaint affirmatively shows a lack of good faith in the prosecution of the appellants' petition in the Federal Court.

Respectfully submitted,

J. ARTHUR MORAN,
Delavan, Wisconsin,
Counsel for Respondents.

APPENDIX I

LAWS OF WISCONSIN, 1907.

No. 257, S. Published June 20, 1907.

CHAPTER 234.

AN ACT to confer civil and criminal jurisdiction on the county court for Walworth County.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

Concurrent with circuit court for cases not over $25,000. SECTION 1. There is hereby conferred on the county court of Walworth county, jurisdiction in all civil actions and proceedings in law and in equity, concurrent with and equal with the jurisdiction of the circuit court in said county, for all claims, demands and sums and to and concerning all property, not exceeding the sum or value of twenty-five thousand dollars; provided, that said county court shall have jurisdiction in all actions in said county for the foreclosure of mortgages and mechanic liens, in which the amount claimed does not exceed the sum above mentioned, although the property to be affected by the judgment exceeds the sum of twenty-five thousand dollars in value; and of all actions for divorce or for affirmance or annulment of marriage contracts; and all actions for removing clouds and quieting title to real estate and all actions for partition of real estate; and in all bastardy actions and in all criminal cases except murder, manslaughter and homicide; and to the amount and within the limits aforesaid the said county court shall be a court of general jurisdiction, with the same power and jurisdiction in all civil and

criminal actions and proceedings, and including the power of review of records on certiorari, discharging mortgages of record, and such other special powers as are now or may hereafter be conferred by the statute upon the circuit court, coming within the above limitations, as belong to and are exercised by the circuit court in and for said county.

Writs and legal process. SECTION 4. The said county court, within the limits aforesaid, shall be a court of record, with a clerk and seal, and shall have full power and authority to issue all writs and legal process, proper and necessary to carry into effect the jurisdiction conferred by this act and the laws of this state, and to carry out such jurisdiction shall have and exercise all powers now possessed, or which may hereafter be possessed by the circuit courts of this state, and the same proceedings shall be had by the parties to procure such writs and process as in circuit courts and such writs and process shall be issued, executed and returned in the same manner and with like effect as in the circuit courts.

Execution: circuit court powers conferred. SECTION 8. All judgments, orders and decrees, made and entered in and by said county court, shall have the same force, effect and lien, and be executed and carried into effect and enforced, as judgments, orders and decrees, made and entered in the circuit court, and all the remedies given, and proceedings provided for the collection and enforcement of the judgments, orders and decrees of the circuit court, shall apply to and be exercised by and pertain to said county court.

Supreme court's review same as for circuit court. SECTION 9. All orders and judgments of said county

court may be reviewed by the supreme court in the same manner and with like effect that judgments and orders of the circuit court may be reviewed; and the supreme court shall have the same power and jurisdiction over such actions, proceedings, orders and judgments as it has over actions, proceedings, orders and judgments in the circuit court of said county, and the parties shall have the same rights to writs of error and appeal from said county court to the supreme court of this state as now, or may hereafter be, allowed by law from circuit courts of this state and may demand and shall be entitled to receive from the judge of said county court a bill of exceptions or case and have the same settled in the same manner and under the same restrictions as in the circuit court and the same shall be heard and settled within the same time as now required or may hereafter be required in the circuit court, by law or the rules and practice of said circuit court or of the said county court relative thereto.

Circuit court procedure unless inapplicable. SECTION 28. The general provisions of the statutes of Wisconsin, and all the general laws which may at any time be in force relative to circuit courts, and actions and proceedings therein, in civil and criminal cases, shall apply also to said county court, unless inapplicable, and except as otherwise provided in this act; and the rules of practice prescribed or which may hereafter be prescribed by the justices of the Supreme Court for circuit court, shall, unless inapplicable, be in force in said county court, and the judge of said county court shall have power to punish for contempt in the same manner that the judges of circuit courts are or may be authorized by law to punish for contempts; and said

county court shall have power to make and enforce such other rules of practice as may be necessary.

Approved June 18, 1907.

(In effect July 1, 1907.)

(Other sections of the Act are omitted as not pertinent.)

APPENDIX II

279 N. W. 685, 228 Wis. 519

Ernest Newton Kalb v. Roscoe R. Luce, Henry Feuerstein, Helen Feuerstein, and George O'Brien.

No. 105

Supreme Court of Wisconsin

May 17, 1938.

1. Courts 97(5)

The claims for relief under the Frasier-Lemke Act present questions arising under the laws of the United States upon which determination of federal courts is controlling. Bankr. Act, Sec. 75(n), as amended, 11 U.S. C.A. Sec. 203(n).

2. Bankruptcy 213

The state court had jurisdiction to proceed to confirm foreclosure sale and execute judgment of foreclosure even though farm debtor's petition under Frasier-Lemke Act was pending, where there was no stay of proceedings granted, since the stay of proceedings provided by the Frasier-Lemke Act is a "judicial stay" not a "statutory stay" and requires application to state or federal

court in which foreclosure proceedings are pending for a stay. Bankr. Act, Sec. 75(n), as amended, 11 U.S. C.A., Sec. 203(n).

3. Assault and Battery 10

The acts of a sheriff in putting mortgage foreclosure purchaser in possession of the premises and executing writ of assistance did not constitute an "assault and battery" where the sheriff used no more force than was reasonably necessary, on ground that sheriff's acts were without warrant in law because of stay provided by Frasier-Lemke Act under which the mortgagor had applied for relief, where there was no stay of proceedings granted, the stay provided for in the act not being self executing. Bankr. Act, Sec. 75(n), as amended, 11 U.S.C.A. Sec. 203(n).

Appeal from an order of the Circuit Court for Walworth County; Edgar V. Werner, Judge.

Affirmed in part; reversed in part.

This action was commenced on September 1, 1937, by Ernest Newton Kalb, plaintiff, against Roscoe R. Luce, county judge for Walworth County, Henry Feuerstein, Helen Feuerstein, and George O'Brien, sheriff, charging the defendants with conspiracy, assault and battery, and false imprisonment. There was a demurrer to the complaint and from an order sustaining the demurrer entered December 23, 1937, the plaintiff appeals. All of the parties to the action reside in Walworth county.

Prior to March 7, 1933, the plaintiff and his wife had executed and delivered to the defendants Feuerstein a mortgage to secure an indebtedness. Proceedings

were begun and a judgment of foreclosure was entered on April 21, 1933. On October 2, 1934, the plaintiff filed a petition under the Frasier-Lemke Act, Bankr. Act, Sec. 75(s), 11 U.S.C.A., Sec. 203(s). No stay of proceedings was granted either in the state or the federal court. On June 27, 1935, the plaintiff's petition was dismissed by the federal court. The Feuersteins then proceeded in the state court and a sheriff's sale was held July 20, 1935. A sheriff's deed was delivered to the purchaser August 2, 1935, and the sheriff's sale on due notice was confirmed September 16, 1935.

On August 28, 1935, Congress passed the second Frasier-Lemke Act, Bankr. Act, Sec. 75, as amended, 11 U.S.C.A., Sec. 203. On September 6, 1935, plaintiff's petition in the bankruptcy court was reinstated and the order of June 27, 1935, vacated. No stay of the foreclosure proceeding was entered or applied for in either the state or the federal court.

Upon the petition of the plaintiffs in the foreclosure action on December 16, 1935, a writ of assistance fair on its face was delivered to the defendant George O'Brien, as sheriff. On March 12, 1936, the sheriff ejected the plaintiff from the mortgaged premises.

For his first cause of action the plaintiff charges the defendants with conspiring and colluding together to acquire possession of his farm and seeks to recover damages for being deprived of the use thereof in the sum of $7,000.

The second cause of action charges the defendant George O'Brien with assaulting and beating the plaintiff pursuant to the direction of the other defendants. The third cause of action charges the defendants with

false imprisonment and seeks to recover damages therefor.

The demurrer to the complaint was on two grounds: (1st) On the grounds that it stated no cause of action against the defendants; and (2nd) that several causes of action were improperly joined. The court sustained the demurrer as to the first and third causes of action as to all of the defendants; as to the second cause of action it sustained the demurrer as to Luce and the defendants Feuerstein but held that it stated a good cause of action against the defendant O'Brien for assault and battery and the defendant O'Brien was given 20 days in which to plead.

J. J. McManamy, of Madison, for appellant.

Thorson & Seymour, of Elkhorn, and Moran & O'Brien, of Delavan, for respondents.

ROSENBERRY, Chief Justice.

Upon this appeal the plaintiff contends that on and after September 6, 1935, when plaintiff's petition in the bankruptcy court was reinstated, the county court for Walworth county was wholly without jurisdiction to proceed to confirm the sale held August 2, 1935, and to execute the judgment of foreclosure. Plaintiff's contention arises under the amendment to Section 75 of the Bankruptcy Act enacted by Congress August 28, 1935, 11 U.S.C.A., Sec. 203(n), which is printed in the margin.

(1) It is the contention of the plaintiff that this statute is self-executing—that is, that it requires no application to the state or federal court in which foreclosure proceedings are pending for a stay; in other words, that it provides for a statutory and not for a judicial stay. Plaintiff's claims under the Bankruptcy

Act present a question which clearly arises under the laws of the United States and therefore present a federal question upon which determination of the federal courts is controlling.

(2) It has been held by the Circuit Court of Appeals for the Ninth Circuit, *Hardt v. Kirkpatrick,* 1937, 91 F. 2d 875, that a stay provided for by Section 75(o) and Section 75(s), as amended, 11 U.S.C.A. Section 203(o,s), is a judicial stay and not a statutory stay. While the plaintiff in this action claims his rights under Section 75(n) the same reasoning applied in the *Hardt Case* leads to the same conclusion in this case. Under the amendment to Section 75 of the Bankruptcy Act, 11 U.S.C.A., Sec. 203, the federal courts have consistently conformed to this conclusion. See cases cited 11 U.S.C.A. p. 1004, under title "Foreclosure of mortgage." See *In re Arend,* D. C., Mich., 1934, 8 F. Supp. 211. The Circuit Court of Appeals, Seventh Circuit, held in *Re Lowmon, La Fayette Life Ins. Co. v. Lowmon,* 1935, 79 F. 2d 887, that the Bankruptcy Act could not be so construed as to extend the period of redemption which had expired according to the provisions of a state statute and if so construed it would be unconstitutional.

(3) The defendant O'Brien seeks a review of that part of the order which holds that a cause of action for assault and battery is stated as to him. There is no allegation in the second cause of action that the defendant O'Brien used any excessive force or that he used more force than was reasonably necessary to put the defendants Feuerstein in possession of the mortgaged premises and to execute the writ of assistance. It is claimed

that the acts of O'Brien were wrongful because without warrant in law. This contention is based upon the same grounds upon which the other contentions were made—that is, that the court was wholly without jurisdiction to confirm the sale or to issue the writ of assistance. If as we hold the writ of assistance was validly issued then the allegations contained in the second contention with respect to assault and battery are insufficient.

Upon the appeal of the plaintiff that part of the order appealed from is affirmed. Upon motion to review of the defendant O'Brien, so much of the order as overrules the demurrer as to the second cause of action is reversed and cause remanded for further proceedings according to law.

APPENDIX III

280 N.W. 725, 228 Wis. 523

Ernest Newton Kalb v. Roscoe R. Luce, Henry Feuerstein, Helen Feuerstein, and George O'Brien.

No. 105

Supreme Court of Wisconsin

June 29, 1938.

1. Bankruptcy 213.

Where state court confirmed foreclosure sale and execution judgment when farm debtor's petition under Bankruptcy Act was pending in federal court, stay of proceedings was granted in neither state nor federal court, no appeal was taken, and purchaser at foreclosure was put in possession, debtor could not claim that state court's

order was void. Bankr. Act, Sec. 75, as amended, 11 U.S.C.A., Sec. 203.

2. Bankruptcy 217

The Bankruptcy Act providing for stay of proceedings in cases where an insolvent farmer files petition for extension of time in which to pay debts does not provide for a statutory stay, but creates rights which when properly asserted are grounds for a judicial stay. Bankr. Act, Sec. 75, as amended, 11 U.S.C.A., Sec. 203.

Appeal from an order of the Circuit Court for Walworth County; Edgar V. Werner, Judge.

On motion for rehearing.

Motion denied.

For prior opinion, see 279 N.W. 685.

J. J. McManamy, of Madison, for appellant.

Thorson & Seymour, of Elkhorn, and Moran & O'Brien, of Delavan, for respondents.

ROSENBERRY, Chief Justice.

On motion for rehearing. The appellant has moved for a rehearing upon the authority of *James M. Wright, Petitioner v. Union Central Life Insurance Company*, 58 S. Ct. 1025, 82 L. Ed.—, decided May 21, 1938. That case does not deal with and so far as we can see, has no bearing upon the question involved in this case and in the companion case. It holds the provisions considered constitutional. The plaintiff proceeds upon the theory that the order of the county court for Walworth County confirming the sale was without jurisdiction because after the plaintiff in this action had filed his petition under Section 75 of the Bankruptcy Act, as amended on Au-

gust 28, 1935, 11 U.S.C.A., Sec. 203, the state court was without jurisdiction to proceed. There was no motion for a stay either in the federal court or in the state court, the plaintiff's theory being that the filing of the petition divested the state court of all jurisdiction to proceed in the action then pending before it.

It is considered that plaintiff's position is not well taken. It may be conceded that the filing of the petition in the federal court created certain rights which the plaintiff in this action might have asserted either in the federal court or in the state court. However, the plaintiff failed to assert such rights either in the federal or state court as has already been stated. All that this court is called upon to do is to determine whether or not the order of confirmation was valid and that depends upon whether the county court for Walworth County had jurisdiction to make the determination. If it should be held that the mere filing of the petition divested the state court of jurisdiction the whole matter would be thrown into inextricable confusion. No one would know whether a judgment of foreclosure of a state court with an order confirming a sale thereunder was valid or void until a search had been made of the records of the federal courts.

(1) We need not consider nor discuss the question whether the congress has power to divest the jurisdiction of a state court which has once attached. That question is not presented by this record. It would seem from a consideration of Sec. 75 as amended, 11 U.S.C.A., Sec. 203, that the filing of the petition automatically operated to extend the period of redemption. It is possible that that state of facts if made to appear would make the order of the trial court erroneous but the order would be within the power of the court to make. No

appeal having been taken, no showing having been made in the state court, an order of sale having been confirmed and the purchaser put in possession, the plaintiff is in no position to claim that the order of the circuit court is void.

(2) We adhere to our former determination that the provisions of Sec. 75 were not intended to provide for a statutory stay but to create rights when properly asserted are grounds for a judicial stay.

Nor do we find anything in the case of *Adair v. Bank of America National Trust & Savings Association*, 58 S. Ct. 594, 82 L. Ed.—, decided February 28, 1938, to the contrary. While it is stated in that opinion that Sec. 75 provides that the filing of the petition shall effect a stay, the cases cited in support of the proposition are cases relating to the power of a court of bankruptcy to stay proceedings and it is held that courts of bankruptcy have that power. The court said: "In order to operate and protect the property during the stay, and pending confirmation or other disposition of the composition or extension proposal, the statute provides in subsections (e) and (n) (11 U.S.C.A., Sec. 203 (e, n)) for the exercise by the court of such control over the property of the farmer as the court deems in the best interests of the farmer and his creditors. These provisions look toward the maintenance of the farm as a going concern, and afford clear authority, in a proper case, for the continuance of the operations of the farm after the filing of a petition under Section 75 of the Bankruptcy Act."

See *Wright v. Vinton Branch*, 1937, 300 U.S. 440, at page 466, 57 S. Ct. 556 at page 563, 81 L. Ed. 736, 112 A.L.R. 1455.

Motion denied without costs.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939

No. 121

ERNEST NEWTON KALB,

Appellant,

vs.

ROSCOE R. LUCE, HENRY FEUERSTEIN, HELEN FEUERSTEIN AND GEORGE O'BRIEN.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

STATEMENT AS TO JURISDICTION.

WILLIAM LEMKE,
JAMES J. MCMANAMY,
Counsel for Appellant.

INDEX.

Subject Index.

Statute Cited.

IN SUPREME COURT, STATE OF WISCONSIN

JANUARY TERM, 1939

Case No. ——.

ERNEST NEWTON KALB,

Appellant;

vs.

ROSCOE R. LUCE, HENRY FEUERSTEIN AND HELEN FEUERSTEIN AND GEORGE O'BRIEN,

Appellees.

STATEMENT AS TO JURISDICTION.

Action to recover in damages for loss of appellant's farm, for damages for assault and battery and false imprisonment.

Federal Question Presented.

The Federal question here presented is whether after the filing of a petition by a farmer under Section 75 (n) of the Bankruptcy Act as amended August 28, 1935, 49 Statutes at Large 943; Chapter 792, and while such petition is pending, a State court in which a mortgage foreclosure of the petitioner's farm is pending, such court has jurisdiction to confirm a sheriff's report of sale and direct the delivery of a deed to the mortgagee, the purchaser.

Manner in Which the Federal Question was Raised.

The appellant bases his right to maintain this action on the ground that the order of the District Court of the United States for the Eastern District of Wisconsin made September 6, 1935, reinstating his petition which was filed on October 2, 1934, under Section 75 (n) of the Bankruptcy Act, 48 Statutes at Large 1289, Chapter 869, as amended August 28, 1935, 49 Statutes at Large 943, Chapter 792, instanter divested the State court of all jurisdiction to enter an order on September 16, 1935, confirming a sheriff's report of sale in a mortgage foreclosure had on July 20, 1935, and that the order so entered confirming such report of sale and directing the delivery of a sheriff's deed is wholly void. The prayer is for damages. Section 75 (n) of the Bankruptcy Act, 49 Statutes at Large 943, Chapter 792, reads as follows:

> "That section 75 of said Act, as amended, be further amended by amending subsection (n) to read as follows:
>
> "(n) The filing of a petition or answer with the clerk of court, or leaving it with the conciliation commissioner for the purpose of forwarding same to the clerk of court, praying for relief under section 75 of this Act, as amended, shall immediately subject the farmer and all of his property, wherever located, for all the purposes of this section, to the exclusive jurisdiction of the court, including all real or personal property, or any equity or right in any such property, including, among others, contracts for purchase, contracts for deed, or conditional sales contracts, the right or the equity of redemption where the period of redemption has not or had not expired, or where a deed of trust has been given as security, or where the sale has not or had not been confirmed, or where deed had not been delivered, at the time of filing the petition."

The appellant asserts that the filing of his petition vests the Federal court with exclusive jurisdiction of all of his property and protects it from interference by State courts, and divests all State courts of jurisdiction while his petition is so pending; that no restraining order to the State court is required to effect such protection.

How Question Raised in Trial Court.

A general demurrer to the complaint was sustained by the trial court as to the defendants Luce and Feuerstein and was overruled as to the defendant O'Brien.

On Appeal to the Supreme Court of Wisconsin.

On appeal to the Supreme Court of Wisconsin so much of the order as affirmed the demurrer of the defendants Luce and Feuerstein was affirmed; and that part of the order overruling the demurrer of the defendant O'Brien was reversed.

That on December 29th, 1938, the trial court entered judgment dismissing the complaint.

On appeal to the Supreme Court of Wisconsin the judgment dismissing the complaint was affirmed on April 20th, 1939, and from such judgment this appeal is taken.

WILLIAM LEMKE,
Fargo, North Dakota,
Attorney for Appellant.
JAMES J. MCMANAMY,
Madison, Wisconsin,
Attorney for Appellant.

EXHIBIT "A".

IN SUPREME COURT, STATE OF WISCONSIN.
JANUARY TERM, 1939.

ERNEST NEWTON KALB, *Appellant*,

vs.

ROSCOE R. LUCE *et al.*, *Respondents*.

Appeal from a judgment of the circuit court for Walworth county: Edgar V. Werner, Circuit Judge. *Affirmed.*

This case was here upon a former appeal which was from an order sustaining a demurrer. The Supreme Court of the United States having declined to review the determination of this Court because it was not final, the record was remitted to the trial court. There such proceedings were had that a final judgment dismissing the plaintiff's complaint was entered on December 29, 1938. From that judgment the plaintiff appeals.

By the COURT:

The issues raised upon this appeal were considered by this Court in *Kalb* v. *Luce* (1938), 228 Wis. 519, 279 N. W. 685. For the reasons there stated as grounds for sustaining the demurrer to the complaint, the judgment of the court dismissing the complaint should be affirmed.

The judgment appealed from is affirmed.

STATEMENT OPPOSING JURISDICTION

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 121

ERNEST NEWTON KALB,

Appellant,

vs.

ROSCOE R. LUCE, HENRY FEUERSTEIN, HELEN FEUERSTEIN AND GEORGE O'BRIEN.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

A. T. THORSON,
J. ARTHUR MORAN,
Counsel for Appellees.

INDEX.

Subject Index.

Statutes Cited.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 121

ERNEST NEWTON KALB,

Appellant,

vs.

ROSCOE R. LUCE, HENRY FEUERSTEIN, HELEN FEUERSTEIN AND GEORGE O'BRIEN,

Appellees.

JOINT STATEMENT OPPOSING JURISDICTION.

For the sake of brevity, no additional Statement of Facts is here made but reference is made to the opinions of the State court attached as Exhibits A and B to the Statement as to Jurisdiction in Case No. 374 of the October Term, 1938.

The Appellees severally contend that there is no substantial Federal question presented by this appeal for the following reasons:

1. The stay provided by Section 75 (n) of the Bankruptcy Act as amended August 28, 1935, 49 Statutes at Large 943, Chapter 792, is a *judicial* stay and not an automatic or statutory one. The statute is an assertion of jurisdiction in the Federal court and the filing of a petition only serves

to create rights which are grounds for a judicial stay if properly asserted. To hold that mere filing of the petition divested the State court of jurisdiction in the foreclosure case would throw the whole matter of titles into inextricable confusion. This rule is too well settled for reasonable argument.

2. In Wisconsin, the foreclosure sale is not had until the expiration of one year from the date of the foreclosure judgment. Sec. 278.10, Wisconsin Statutes.

Sec. 278-13, Wisconsin Statutes provides in part:

> "The mortgagor . . . may redeem the mortgaged premises at any time before the sale . . ."

To hold that the State court lost jurisdiction in the foreclosure proceedings by the filing of the petition after more than one year from the date of the foreclosure decree when the period of redemption had expired or at least run for more than one year (and in this case more than two years) would be an application of the so-called Second Frazier-Lemke Act which would make it unconstitutional as it has been definitely decided that Congress has no power to extend the period of redemption after the time had begun to run.

3. The complaint affirmatively demonstrates debtor appellant's failure to pursue the proper remedy by appealing from the judgment of the State court confirming the foreclosure sale, and by debtor's discontinuance of the bankruptcy proceedings and his failure to prosecute such proceedings to a conclusion.

4. The Full Faith and Credit Clause of the Federal Constitution would be violated if the Court refused to recognize the validity of the foreclosure sale and confirmation as it appears that the foreclosure decree was entered April 21, 1933, and the filing of debtor's petition under

Sec. 75 of the Bankruptcy Act as amended August 28, 1935, was not until September 6, 1935, and the period of redemption had already expired or at least had begun to run more than two years prior thereto.

5. Filing of the petition under the Second Frazier-Lemke Act appears to have been solely for the purpose of delay and harassment and debtor appellant having failed to prosecute the proceedings instituted by him in the Federal court, four years having now elapsed since the date of the reinstatement of his amended petition.

6. The Appellee, Roscoe R. Luce, is the County Judge of Walworth County and the complaint is so framed that its allegations so far as he is concerned, show that what he did was done in his judicial capacity. It is obvious that whether his decision was right or wrong, that he acted with a *color* of jurisdiction; in fact, the Trial Court and the Supreme Court of Wisconsin have decided that he did have jurisdiction. A Judge is immune from prosecution at the suit of a disappointed litigant, and hence no cause of action is stated against the Appellee, Luce, even if it were conceded that there was an improper construction of the Federal statute.

7. The Appellee, George O'Brien, was the Sheriff of Walworth County and the complaint is so framed that its allegations show that what he did was done in his official capacity. It is the fixed law of Wisconsin that where a sheriff executes a writ fair on its face, that it is not his duty to pass upon its sufficiency but it constitutes a complete protection to the officer executing it, even where the magistrate acted without jurisdiction. Hence, no cause of action is stated against the Appellee, O'Brien, even if it were conceded that there was an improper construction of the Federal statute.

8. The complaint in the State court affirmatively shows that the Appellees, Henry Feuerstein and Helen Feuerstein, acted solely in an attempt to exonerate their legal rights and cannot be held liable for any tort arising out of an honest statement of fact made to the magistrate having jurisdiction in the proceedings.

Dated July 5, 1939.

ARTHUR T. THORSON,
J. ARTHUR MORAN,
Attorneys for Appellees.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 121

ERNEST NEWTON KALB,

Appellant,

vs.

ROSCOE R. LUCE, HENRY FEUERSTEIN, HELEN FEUERSTEIN AND GEORGE O'BRIEN,

Appellees.

Upon the foregoing Joint Statement Opposing Jurisdiction, and upon the records and files herein, the Appellees, Roscoe R. Luce (County Judge), and George O'Brien (Sheriff), by their attorneys, move the Court for an order dismissing the appeal for want of a substantial Federal question, and, in the alternative, for an order affirming the judgment of the Supreme Court of Wisconsin for the reason that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Dated July 5, 1939.

ARTHUR T. THORSON,
J. ARTHUR MORAN,
Attorneys for Roscoe R. Luce and George O'Brien.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 121

ERNEST NEWTON KALB,

Appellant,

vs.

ROSCOE R. LUCE, HENRY FEUERSTEIN, HELEN FEUERSTEIN AND GEORGE O'BRIEN,

Appellees.

Upon the foregoing Joint Statement Opposing Jurisdiction, and upon the records and files herein, the Appellees, Henry Feuerstein and Helen Feuerstein, by their attorney, move the Court for an order dismissing the appeal for want of a substantial Federal question, and, in the alternative, for an order affirming the judgment of the Supreme Court of Wisconsin for the reason that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Dated July 5, 1939.

J. ARTHUR MORAN,
Attorney for Henry Feuerstein and Helen Feuerstein.

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 121

ERNEST NEWTON KALB, *Appellant,*

vs.

ROSCOE R. LUCE, HENRY FEUERSTEIN, HELEN FEUERSTEIN AND GEORGE O'BRIEN, *Respondents.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF OF THE RESPONDENTS

ARTHUR T. THORSON, Elkhorn, Wis.
J. ARTHUR MORAN, Delavan, Wis.
Counsel for Respondents.

HAMMERSMITH-KORTMEYER CO., MILWAUKEE

INDEX

SUMMARY OF ARGUMENT

Page

CASES CITED

TEXTS AND NOTES CITED

STATUTES CITED

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 121

ERNEST NEWTON KALB, *Appellant,*

vs.

ROSCOE R. LUCE, HENRY FEUERSTEIN, HELEN FEUERSTEIN AND GEORGE O'BRIEN, *Respondents.*

BRIEF OF THE RESPONDENTS

NATURE OF CASE

Appellant has correctly stated the nature of the case but therein makes the following misstatement: "Both of these cases (Case No. 120 and 121) arose from the same facts and transactions. Both involve the same question of law and the decision in one must necessarily govern the decision in the other."

Case No. 120 is an action in equity to recover possession of the farm and to annul and cancel the Sheriff's deed.

Case No. 121 is a suit at law in tort for damages against the County Judge, Roscoe R. Luce, and the

Sheriff, George O'Brien, and the plaintiffs in the foreclosure suit Henry and Helen Feuerstein, for action taken by them respectively in the foreclosure suit.

It is one thing to hold that the decision made by County Judge Luce in the foreclosure action was erroneous and that the Sheriff's deed was void. It is quite another to say that as a result thereof the Judge who made the erroneous decision, and the Sheriff who executed the Writ of Assistance delivered to him pursuant to the Court's order, or even the litigants who were merely seeking their legal rights, are liable in tort for damages by reason thereof.

It is submitted that it is apparent that both do not involve the same question of law and that the decision in one case does not necessarily govern the decision in the other.

OPINION BELOW

It should be added, in addition to the statement contained in appellant's brief and in explanation of the decision and direction for further proceedings by the Supreme Court of Wisconsin in its decision on the appeal from the demurrers as set forth on pages 10 to 13 of the transcript, that the trial court had overruled the demurrer of the defendant, Sheriff O'Brien, as to the second cause of action alleging assault and battery. The Supreme Court, on motion for review by the defendant, George O'Brien, on that appeal, decided that the allegations of appellant's complaint as to the second cause of action were insufficient in that it failed to allege that O'Brien used any excessive force or that he used more force than was reasonably necessary. The

trial court on this score was reversed with directions to sustain the demurrer, but with leave to the appellant to file an amended complaint within twenty days. No amended complaint was served by appellant as permitted by the orders (R. 9, 17 and 18) and judgment was entered against the appellant on each cause of action in favor of all defendants. (R. 18)

JURISDICTION

A statement opposing jurisdiction and a motion to dismiss or affirm was made in which it is contended that ample, independent, non-Federal grounds support the State Court decision and that this appeal should, therefore, be dismissed.

STATEMENT OF THE CASE

In this connection we desire only to point out counsel's misstatements appearing on pages 4, 5, and 6 of their brief to the effect that the foreclosure proceedings were begun in the *Circuit* Court of Walworth County. The foreclosure proceedings were entirely in the *County* Court of Walworth County. The suit at bar for damages is brought in the Circuit Court. Hence, we have here a case where it is attempted to have the Circuit Court collaterally attack or question a decision of the County Court.

Counsel state that the order confirming the sale on September 16, 1935, was without notice to the appellant although the laws of Wisconsin require notice. This is not a fair statement. The notice of motion to confirm the Sheriff's report of sale was given as required by statute. This was to be heard September 9.

The Court deferred ruling and continued the matter to September 16. Whether it was in fact adjourned to a day certain or the Court merely deferred ruling by taking the matter under advisement, is wholly immaterial.

QUESTIONS INVOLVED

In addition to the sole issue claimed to be involved by appellant, namely, whether the stay provided by Subsec. (n) of Sec. 203, Title 11, U.S.C.A. is self-executing, there are also involved the following issues or questions which counsel have failed to state or discuss:

1. Should the motion to dismiss for want of a substantial federal question or, in the alternative, to affirm be granted because independent and adequate non-Federal grounds support the State Court decision?

2. A. Is not the respondent, Hon. Roscoe R. Luce, County Judge, who acted in his official capacity, immune from liability even if error was committed where facts were present which had either legal value or *color* of legal value even though it be subsequently held he had no jurisdiction?

B. Is not Sheriff George O'Brien immune from liability in executing the Writ of Assistance which was fair on its face where it is not alleged that he had knowledge of want of jurisdiction?

C. Are not the litigants, Henry and Helen Feuerstein, free from liability in tort where they merely sought to obtain their legal rights?

3. Can this suit in the Circuit Court of Walworth County for damages be maintained as a collateral

attack upon the orders of the County Court of Walworth County?

4. Does not the Full Faith and Credit Clause of the Federal Constitution require that this Court recognize the validity of the Wisconsin Supreme Court's decision in so far as it is based on non-Federal grounds and, likewise, the validity of the foreclosure sale and proceedings in the County Court?

5. Does not the complaint affirmatively disclose a lack of good faith on the part of the appellant in the bankruptcy proceedings and a failure to comply with the provisions of Sec. 75 and result in an abandonment of those proceedings?

6. Were not the demurrers correctly sustained as to the second and third causes of action for the reasons that the allegations are insufficient under Wisconsin law,

A. In that the second cause of action fails to allege that Judge Luce and Henry and Helen Feuerstein were present or that they aided or abetted the Sheriff and because it fails to allege that they *intended* to cause the Sheriff to commit an assault and battery?

B. In that the third cause of action fails to connect Judge Luce and Henry and Helen Feuerstein with the alleged false imprisonment and in that it fails to allege in what respect the restraint was illegal?

ARGUMENT

I.

THE MOTION TO DISMISS FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION OR, IN THE ALTERNATIVE, TO AFFIRM SHOULD BE GRANTED BECAUSE INDEPENDENT AND ADEQUATE NON-FEDERAL GROUNDS SUPPORT THE STATE COURT DECISION

In accordance with the rules of this Court, motion was made by the respondents herein to dismiss the appeal or to affirm the lower Court on the ground that no substantial Federal question was presented.

On October 9, 1939, this Court ordered that "Further consideration of the question of the jurisdiction of this Court and of the motions to dismiss or affirm is postponed to the hearing of the cases on the merits."

The arguments hereinafter made in general in opposition to the appellant's contentions apply with equal force to respondents' motion to dismiss for want of a Federal question or, in the alternative, to affirm and are not here repeated but reference thereto is made.

While the Supreme Court of the State of Wisconsin in its original decision discussed the application of the Frazier-Lemke Act, as amended, to mortgage foreclosures in Wisconsin courts (see R. 10, 11, 12, 13), it nevertheless held upon non-Federal grounds that the complaint did not state a cause of action against the defendant, O'Brien (Sheriff).

But upon the appellant's motion for rehearing the Wisconsin Supreme Court eliminated the Federal ques-

tion entirely, (R. 14, 15, 16) and decided the case upon other and non-Federal grounds. Mr. Chief Justice Rosenberry, speaking for the Court said:

> "All that this court is called upon to do is to determine whether or not the order of confirmation was valid and that depends upon whether the county court for Walworth county had jurisdiction to make the determination. If it should be held that the mere filing of the petition divested the state court of jurisdiction the whole matter would be thrown into inextricable confusion. No one would know whether a judgment of foreclosure of a state court with an order confirming a sale thereunder was valid or void until a search had been made of the records of the federal courts.
>
> We need not consider nor discuss the question whether the congress has power to divest the jurisdiction of a state court which has once attached. That question is not presented by this record. It would seem from a consideration of Sec. 75 as amended that the filing of the petition automatically operated to extend the period of redemption. It is possible that that state of facts if made to appear would make the order of the trial court erroneous but the order would be within the power of the court to make. No appeal having been taken, no showing having been made in the state court, an order of sale having been confirmed and the purchaser put in possession, the plaintiff is in no position to claim that the order of the circuit court is void."

Counsel for respondents respectfully submit that only one conclusion can be drawn from the language above set forth and that conclusion is that the Wisconsin Supreme Court sustained the lower court upon the theory that the judgment and orders of the County Court, even though erroneous, were within the power

of that court to make and could only be questioned by appeal to the proper appellate tribunal.

We have fully discussed the question of collateral attack elsewhere in our brief and will not repeat our argument here. Suffice it to say that as an elementary proposition, a judgment entered by a court having jurisdiction of cases of the kind and class of that adjudged, cannot be collaterally attacked.

The rule is well established that where the decision of the state court is deemed to rest upon a non-Federal ground which independently and adequately supports the state court judgment, the United States Supreme Court will not exercise jurisdiction to review, notwithstanding the raising of federal questions upon the state court record or the decision of those questions by the state court. Where such an independent and adequate non-Federal ground of decision appears, review may not be had in the Supreme Court even though the state court *also in terms purports to decide a federal question, and decides it erroneously.*

Applying the above rule to the case at bar, it seems clear to us that even though the Supreme Court of Wisconsin discussed the application and validity of the Frazier-Lemke Act, still the case is not entitled to review by this tribunal for the reason that there are ample non-Federal grounds upon which the judgment of the state court may, and in fact must, be sustained.

Even though all of the contentions of the appellant with regard to the Frazier-Lemke Act be sustained, the remanding of the case to the State Court for further proceedings would be useless and profitless for the State Court could thereafter enter the same judgment upon the non-Federal grounds alone.

The questions of collateral attack, judicial immunity, immunity of an officer while enforcing a writ valid on its face, immunity of a litigant for merely seeking the enforcement of his legal rights are all purely non-Federal questions and are not proper matters for review by this Court. And this is true even though the State Court discussed, and as it is claimed, erroneously decided a question relating to a Federal statute.

In the case of *Enterprise Irrigation District vs. Farmers Mutual Canal Company,* 243 U. S. 157, 164; 37 S. Ct. 318, 61 L. Ed. 644, the state court decided in favor of the respondent upon two grounds, first, that the 14th amendment relating to "due process and equal protection" had not been violated, and second, that the defense of estoppel in pais was well grounded.

This court said:

> "The first was plainly a Federal question and the other was plainly non-Federal. Both were resolved in favor of the Canal Company * * * Thus we are concerned with a judgment placed upon two grounds, one involving a Federal question and the other not. *In such situations our jurisdiction is tested by inquiring whether the non-Federal ground is independent of the other and broad enough to sustain the judgment.* Where this is the case, the judgment does not depend upon the decision of any Federal question and we have no power to disturb it. (Italics ours).

To the same effect are the following cases: *Hammond v. Johnson,* 142 U. S. 73; 35 L. Ed. 941, 12 S. Ct. 141. *Eustis v. Bolles,* 150 U. S. 361, 37 L. Ed. 1111, 14 S. Ct. 131.

It seems to us obvious from the whole record that the State Court reached its ultimate conclusions upon the principal ground that the orders of the County Court could not be attacked collaterally.

In any event it is clear from the record that the State Court could and doubtless would, if the case were remanded, rule against the appellant on that and other non-Federal grounds. Sufficient reasons therefore exist for either dismissal or affirmance by this Court.

In *Murdock v. Memphis,* 20 Wall. 590, 634, 635; 22 L. Ed. 429, this Court said:

> "But when we find that the State Court has decided the federal question erroneously, then to prevent a useless and profitless reversal, which can do the plaintiff in error no good, and can only embarrass and delay the defendant, we must so far look into the remainder of the record so as to see whether the decision of the federal question alone is sufficient to dispose of the case, or to require its reversal; or on the other hand, whether there exist other matters in the record actually decided by the State Court which are sufficient to maintain the judgment of that Court, notwithstanding the error in deciding the federal question. In the latter case the court would not be justified in reversing the judgment of the State Court."

In view of the fact that the record establishes ample non-Federal grounds upon which the State Court could and did decide the case adversely to the appellant, respondents' motion to dismiss or affirm, should we respectfully submit, be granted.

II.

DEMURRER ADMITS ONLY FACTS WELL PLEADED

Throughout the various causes of action, appear such language as "arbitrarily, wrongfully and unlawfully," and "while the exclusive jurisdiction of the person of the

plaintiff and of all of his property, both real and personal, was in the United States District Court," and "the acts * * * were done and performed in collusion."

This language and these allegations are but conclusions of law, are not well pleaded, and are not admitted by demurrer.

Aaron v. Wausau, 98 Wis. 595.
Coughlin v. Milwaukee, 227 Wis. 357.
49 C. J. 438.

III.

IMMUNITY. JUDGE ROSCOE R. LUCE WHO ACTED IN HIS JUDICIAL CAPACITY, SHERIFF GEORGE O'BRIEN WHO ACTED IN HIS OFFICIAL CAPACITY, AND LITIGANTS HENRY AND HELEN FEUERSTEIN WHO MERELY SOUGHT LEGAL RIGHTS, ARE IMMUNE FROM LIABILITY FOR DAMAGES

A. Complaint discloses defendant, Honorable Roscoe R. Luce, County Judge, acted in his judicial capacity and no cause of action is stated against him as he is immune from diability even if error is committed where facts are present which have either legal value or color of legal value, though it be subsequently held he had no jurisdiction.

As stated by the Trial Court:

"This complaint * * * is so framed that its allegations as far as the defendant Roscoe R. Luce is concerned, shows that what he did was done in his judicial capacity as county judge * * * ."

Appellant argues that the exclusive jurisdiction over him and his property on September 16, 1935, was in the Bankruptcy Court and that the respondent, Judge Luce, by erroneously deciding, as his minutes on that day show, "Court holds Federal Act inapplicable where sale has been had," that he thereupon became a trespasser and liable to the plaintiff for signing judicial orders, pursuant to which he was removed from his farm.

The mere statement of this proposition seems to refute it. How can there be any fearless, independent judiciary, how could our democratic form of government succeed, if a Court, in every case where a question of jurisdiction is involved, must be subjected to the fear and constant danger of having his decision challenged and made a defendant in a damage suit by the disappointed litigant? By the same reasoning, the several judges of the Supreme Court of Wisconsin would likewise be liable to appellant if they erroneously decided a question of jurisdiction adverse to him which might later be reversed by the Supreme Court of the United States.

Questions of jurisdiction are frequently difficult; decisions thereon are often conflicting and by divided Courts; many of the questions presented are extremely close, border-line cases. They are often raised by the ablest legal talent and are argued with a degree of persuasiveness that oft-times baffle the keenest minds of the judges. Judges are human and however great may be their learning, their industry and their zeal to ascertain and determine the truth, their logic and the conclusions derived therefrom are not always sound.

Public policy of necessity requires judicial immunity from damage suits. This rule is the bulwark of all jurisprudence, and is firmly fixed as the law of this state.

For instance in this case, as pointed out in the note in 99 A.L.R., page 1400,

> "the necessary steps to effect a stay of proceedings under the Statutes, especially the instance mentioned in Subsec. n and o has been somewhat in doubt and the question remains a troublesome one. The view seems to have been taken in some cases that the Statute is self executing, * * * while others seemed inclined to take the view that only specific order, upon application made, will a Bankruptcy Court's power or the provisions of the Statute be brought into play to interfere with the machinery of State Tribunal or officers * * * ."

There is no dispute that the County Court of Walworth County has civil jurisdiction of the foreclosure proceedings there instituted. For the purposes here in question, it has concurrent jurisdiction with our circuit courts which are our courts of general jurisdiction under our constitution, Chapter 234, Laws of Wis. 1907. (Appendix 1). A judgment had been issued and every court has the power to enforce its own judgment.

Judge Luce's decision holding that the Frazier-Lemke Act was inapplicable to the case before him, since the sale had been held and deed delivered, was supported by the rulings of several Federal cases among which are: *In Re Tabor,* 11 F. Supp. 555; *In Re Arend,* 8 F. Supp. 211; *In Re Klein,* 9 F. Supp. 57; *In Re Chaboya,* 9 F. Supp. 174. See also *La Fayette v. Lowman,* 79 F. (2d) 887; *U. S. National Bank v. Pamp,* 83 F. (2d) 493.

In view of that fact it was not only the right but the duty of Judge Luce to determine whether or not that law suspended the power of the County Court of Walworth County to enforce its judgment.

As was said in *State v. Sawyer,* 113 Me., 458; L.R.A. 1915 F. 1031; 11 Am. Jur. 103,—

> "If before the constitutionality of an act of Congress has been decided by the Federal Supreme Court, 'the enforcement of a state law depends upon whether Congress had power under the Constitution to pass an act the effect of which is to suspend the state law, then it becomes the duty of the state court to act in accordance with its own decision of that question until such time at least as it may be otherwise finally determined by the supreme tribunal'."

On this question, we contend that the decisions of our State Court are controlling though they are in conformity with the general rule which obtains in the Federal jurisdiction.

In *Robertson vs. Parker,* 99 Wis. 653, it is held that a judge, who acts wholly without jurisdiction and wilfully, maliciously or corruptly, might be liable for such action. This rule was modified in *Wasserman vs. Kenosha,* 217 Wis. 223, and it is now the law of this State that:

> "a Judge is not liable even though he act maliciously."

In the Robertson case, the Court says:

> "It requires no argument to show that the doctrine of judicial immunity is absolutely essential to the very existence of the judicial office * * * Grove Van Duyn, 44 N. J. Law 654, is a case in which these questions are discussed with great learning and ability. Beasley, C. J. thus announces the rule. *'When the Judge is called upon by the facts before him to decide whether his authority extends over the matter, such an act is a jurisdictional act, and such officer is not liable, in a suit, to the person affected by his decision, whether such decision be*

right or wrong. But when no facts are present, or only such facts as have neither legal value nor color of legal value in the affair, then, in that event, for the magistrate to take jurisdiction is not, in any manner, the performance of a judicial act, but simply the commission of a judicial wrong * * * Such protection is necessary to the independence and usefulness of the officer.'"

A case which is particularly in point is *Langen v. Borkowski,* 188 Wis. 277, 206 N.W. 181. It was an action to recover damages for false imprisonment against the Circuit Judge, the sheriff and the Clerk of Court. The Court there said:

"The circuit court is a court of general jurisdiction. In the performance of his duties, the judge of such a court is constantly engaged in deciding the various issues presented upon a trial, questions of pleading and practice, the admissibility or non-admissibility of evidence, the decision of cases, the nature and extent of his jurisdiction, and the question of whether in a given case or proceeding he has jurisdiction either of the subject matter or of the person, or both. *Where facts are present which have either legal value or color of legal value, he is immune from liability for error committed, even though it be subsequently held that as a matter of law he had no jurisdiction whatsoever of the matter.*" (Italics ours)

The Court further says, quoting approvingly from 11 R.C.L. 813:

"But if he (the court) has jurisdiction to issue process of the kind in question, and if the facts and papers on which he acts are such as to make it a matter for his judicial decision whether he should or should not issue the process in the particular case, he is not personally liable for any imprisonment which may result from his decision,

though it is afterward held it is erroneous, and even though the error may be held to be one of jurisdiction."

The rule is otherwise stated:

"That a judicial officer is not liable when the arrest or detention is in a case belonging to a class over which he has cognizance, and is by complaint or other proceedings put at least colorably under his jurisdiction."

25 C. J. 515.

See to the same effect:

Adair v. Bank of Am. Nat. T. & Sav. Asso., 303 U. S. 350 (at page 358 and cases there cited); 82 L. Ed. 889; 58 S. Ct. Rep. 594.

Bradley v. Fisher, 13 Wall. 335.

Carter vs. Dow, 16 Wis. 317.

33 C. J. 981.

15 R.C.L. 543.

As was said in *Land, Log and Lumber Co. vs. McIntyre*, 100 Wis. 258:

"Such rule (Judicial Immunity) applies to all officers in the performance of judicial or quasi judicial duties, to Judges from the highest to the lowest • • • ; and further, in substance, that if it were otherwise, officers, however conscientious and correct in their official life, would be constantly in danger of having their actions challenged in court by disappointed persons and that independence necessary to judicial functions seriously interfered with."

Wasserman vs. City Kenosha, 217 Wis. 223.

See also note in *13 A. L. R.* 1344.

We submit that under the direct authority of these decisions, there can be no liability predicated against the defendant, Judge Luce, who obviously acted throughout in his judicial capacity.

B. Sheriff George O'Brien is immune from liability in executing the Writ of Assistance which was fair on its face as it is not alleged that he had knowledge of any want of jurisdiction.

It fairly appears from the complaint that whatever the defendant, Sheriff George O'Brien, did was done pursuant to his official duty as sherif in the execution of the Writ of Assistance which was issued out of the County Court and directed that he place the plaintiff, Feuerstein, in the foreclosure action, in the possession of the premises. The Writ of Assistance in question was in the usual form and fair on its face. There is no allegation to the contrary and this is the presumption of law. The County Court of Walworth County had authority and jurisdiction to issue Writs of Assistance. The power of the Court had not been stayed. It was the duty of the sheriff to take the force of the county, if necessary, to execute the Writ and he would have been liable to the plaintiff in the foreclosure action in damages if he had failed to execute it. It is true that the sheriff used force, but the Writ so commanded him, if necessary. There is no allegation in the complaint that the use of force was not necessary or that he used more force than was necessary.

We contend that whether the sheriff is entitled to immunity in executing a Writ fair on its face issued out of the State Court must be determined by the laws of the State of Wisconsin.

The sheriff is immune from liability in executing a Writ valid on its face where he has no knowledge of the lack of jurisdiction of the court issuing the same, as appears from the following cases:

"The officer to whom a search warrant is given is not charged with the duty of passing upon its sufficiency, the warrant constituting a complete protection to the officer executing it, even where the magistrate acts without jurisdiction, provided the officer has no knowledge of such want of jurisdiction."

Chruscicki vs. Hinrichs, 197 Wis. 78.

"As to the constable Strothenke, the case was different. He acted under a warrant of arrest regular on its face, and is not shown to have had any knowledge of any lack of jurisdiction of the justice. Under such circumstances, the officer is protected by his writ. Sprague vs. Birchard, 1 Wis. 457; Lueck vs. Heisler, 87 Wis. 644, 58 N.W. 1101."

Holz vs. Rediske, 116 Wis. 353.

"The warrant, being regular on its face, fully protects both the sheriff and the inspector, as is shown by the numerous authorities cited in the brief of defendants' counsel, among which will be found Gaertner v. Bues, 109 Wis. 165, 85 N. W. 388; Holz v. Rediske, 116 Wis. 353, 92 N. W. 1105; 24 Ruling Case Law, Title "Sheriffs," § 84; 25 Corp. Jur. 477-479; notes in 51 L. R. A. 193-225, and 42 L.R.A. N.S. 69-79."

Langen v. Borkowski, 188 Wis. 277 at 299.

"It is well established as the general rule that the process judgment or order of the court having apparent jurisdiction, if valid on its face, affords complete protection to a sheriff or constable from liability for any proper or necessary act done in due execution, * * * "

57 C. J. 902.

"Where the court had jurisdiction of the subject matter and the process shows apparent jurisdiction in the particular case, the officer is protected if he acted in good faith although the court did not in fact acquire jurisdiction, or although the court had lost jurisdiction before the process was issued."

57 C. J. 905

There is no allegation that the sheriff knew the County Court was without jurisdiction. Even if we assume, therefore, that the Court was without jurisdiction, the complaint states no cause of action as against the defendant, Sheriff George O'Brien.

C. No liability in tort can attach to a litigant who merely seeks to obtain his legal rights.

It is alleged with reference to the third cause of action in the complaint, that the defendants, Henry Feuerstein and Helen Feuerstein, directed the sheriff in falsely imprisoning the plaintiff. It is clearly apparent from the reading of the entire complaint that the sole and only part which they took in this direction was to procure the issuance of a writ of assistance on proper notice, and cause it to be delivered to the sheriff. That there can be no liability on these defendants is clear, and that the complaint fails to state a cause of action in that respect is likewise too clear to require extended argument.

In the case of *Langen v. Barkowski,* 188 Wis. 277, previously referred to, the Court cited *11 R.C.L.,* page 808, as follows, in speaking of a person situated as the Feuersteins are situated in this matter:

"Since such person is usually a layman not familiar with and not pretending to determine the

legal procedure to be taken, it has been said to be unjust to hold him guilty of any tort if he merely makes to the magistrate an honest statement of the facts as he claims them to be and leaves it to the officers of the law to take such action as they deem proper, and under such circumstances many courts have held him not liable. To the same effect is 64 Wisconsin, 316; 24 N.W. 442."

It would be a strange anomaly were a litigant in our courts to be held liable for acts of officers and servants of the court, committed while in the performance of and the carrying out of the instructions, orders, writs, judgments and executions of the courts of this State.

IV.

THIS SUIT IN THE CIRCUIT COURT OF WALWORTH COUNTY IS A COLLATERAL ATTACK UPON THE ORDERS ISSUED BY THE COUNTY COURT OF WALWORTH COUNTY AND CANNOT BE MAINTAINED

A. Federal rule supports contention that County Court orders are voidable and not void, and not subject to collateral attack.

The County Court of Walworth County, by virtue of the legislative enactment which created it, has concurrent jurisdiction within prescribed limits with the Circuit Court of Walworth County, wherein these proceedings were instituted (See Appendix 1).

Among those matters in regard to which the County Court had concurrent jurisdiction with the circuit

court, are the foreclosures of real estate mortgages and all proceedings in reference thereto.

As appears by the complaint herein, the County Court acquired jurisdiction of the person of the defendant and the real estate in question by the institution of foreclosure proceedings which in due course matured in a judgment of foreclosure on April 21st, 1933.

Pursuant to that judgment sale was had on July 20, 1935. These were matters properly within the jurisdiction of the County Court and up to that point no conflict of jurisdiction had arisen.

Following the sale and prior to the confirmation appellant's petition in the Federal Court was reinstated. Upon the application for confirmation the County Court was authorized under long established rules of law, and in fact required to determine whether the jurisdiction of that court was completely terminated.

The Court, in the exercise of his judicial duty, decided that the county court retained jurisdiction and granted the order prayed for.

The appellant herein now institutes an action in the Circuit Court of Walworth County, a court having equal, but no greater jurisdiction, and no appellate jurisdiction over the County Court, collaterally attacking the order issued by the County Court.

It is clear that in order for the respondent to maintain his action and prevail in his appeal, the Circuit Court must find the orders referred to as being utterly void.

We respectfully submit that even if that court held that the judge of the County Court acted in excess of

his jurisdiction, the orders complained of are erroneous and voidable, not void. No appeal having been taken within the statutory period, the orders complained of are and must be free from collateral attack.

It is said in Vol. 1, Freeman on Judgments, P. 718-719 that:

> "If the circumstances which give rise to the jurisdiction do not exist in a particular case the authority to act does not arise. But the question as to whether or not they do in fact exist is a matter primarily for the court whose powers are invoked, and it has jurisdiction to examine and determine whether the particular application is within or beyond its authority. Its decision in this respect is itself the exercise of a power conferred by the pleading or other act invoking its jurisdiction, and if such decision is incorrect, whether because of lack of evidence or for any other reason, it is none the less binding upon the parties *unless and until set aside on appeal or by some other proceeding for that purpose. For jurisdiction to decide includes power to decide erroneously and to make the decision bind collaterally.*" (Italics ours)

The question as to whether or not a judgment rendered by a court upon matters within its jurisdictional scope is subject to collateral has been frequently considered by this Court.

In *Bradley v. Fisher,* 13 Wall. 335, 20 L. Ed. P. 646, the Court observed that a distinction must be observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject matter of the controversy.

Mr. Justice Field said:

> "Where jurisdiction over the subject matter is invested by law in the judge or in the court which

> heoholds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend."

The court by way of illustration pointed out that if a Court having only probate powers were to issue a warrant for a criminal offense it would be acting entirely without jurisdiction and would be liable to respond in damages for the exercise of a usurped authority. But that on the other hand if a judge of a criminal court were to proceed to the arrest of a defendant for the commission of a crime committed outside of his district, no liability would fall upon him for such an act, although it was clearly in excess of his jurisdiction.

It is contended in this case that the County Court erred in holding that it had jurisdiction after the filing of the petition in the Federal Court.

A case squarely in point and supporting our contention that the orders of the County Court cannot be collaterally attacked is *Dowell v. Applegate,* 152 U.S. 327, 14 Sup. Court, Rep. 611, 38 L. Ed. 463. Therein a judgment had been rendered in a District Court. The judgment was collaterally attacked on the ground that no diversity of citizenship existed and was vacated by the Supreme Court of the State of Oregon.

On appeal to the Supreme Court of the United States, Mr. Justice Harlan said:

> "It is claimed that the ground on which the Federal Court assumed jurisdiction was insufficient in law to make this case one arising under the laws of the United States. But that was a question which the circuit court of the United States was competent

to determine in the first instance. *Its determination* of it was *the exercise of jurisdiction.* Even if that court *erred in entertaining jurisdiction,* its determination of that matter was *conclusive upon the parties* before it, and could not be questioned by them or *either of them collaterally,* or otherwise *than on writ of error or appeal* to this court." (Italics ours)

The cited case presents precisely the same situation as the case now before the court. If it be assumed that the sale was wrongly confirmed, then in both, the court erred in the exercise of its jurisdiction, but its decision could not be collaterally attacked.

B. Wisconsin decisions are controlling and support contention that County Court orders are voidable and not void, and not subject to collateral attack.

The law is also well settled in Wisconsin that an order or judgment issued or entered by any court in excess of its jurisdiction is voidable, not void, and cannot be attacked except by appellate proceedings in a court having appellate jurisdiction.

A case arising out of a plexus of facts strikingly similar to the matter now before the Court is *Johnson v. Brewers Fire Ins. Company,* 51 Wis. 570; 8 N.W. 297, in which a Michigan court, although all of the necessary papers in the form required by law had been duly filed for that purpose, refused to remove a cause to the District Court where a diversity of citizenship clearly existed.

The defendant refused to proceed further, a default judgment was rendered against him by the Michigan court and sued on in Wisconsin. On the trial in Wisconsin, the defendant contended that the Michigan judg-

ment was absolutely void on the theory that it had been rendered after that court had been completely divested of any jurisdiction over the cause.

The court held that the Michigan judgment was voidable only and could not be attacked in a collateral proceedings:

> "Mere error in the proceedings of the state court cannot be corrected by this court, or received here, for the obvious reason that we have no revisory power over that court. * * * We hold that when the case is within the Act of Congress and an application in proper form for its removal is made, it is the duty of the state court to accept the petition and bond, and proceed no further in the suit. This is the mandate of the statute. *But if the state court declines to relinquish its jurisdiction and proceeds to judgment such judgment is not void, but merely erroneous. Until it is reversed or set aside in a proper manner by an appellate court, it is valid and must be respected; certainly in a collateral proceeding.*" (Italics ours)

The general rules established by the foregoing decision have been followed and affirmed from time to time by the Supreme Court of Wisconsin.

The clean cut but often misunderstood distinction between an absolute want of jurisdiction and an act in excess of jurisdiction has been fully preserved. The former applies to an act or judgment performed in a matter where the court or judge so acting has absolutely no jurisdiction over the proceedings or the parties before him, and under no set of facts would have the power to act. The latter applies to an act or judgment done by a judge or a court in connection with a cause of action, the subject matter of which falls within that class and kind of cases, the jurisdiction of which is vested in that particular court.

Approval of and extensive elaboration of those rules of law will be found in *State ex rel Fowler v. Circuit Court,* 98 Wis. 143, 73 N.W. 788; *Comstock v. Boyle,* 134 Wis. 613, 114 N.W. 1110; *In re Clark,* 135 Wis. 437, 115 N.W. 387; *Harrigan v. Gilchrist,* 121 Wis. 127, 99 N.W. 909. And in *Re Rice's Will,* 150 Wis. 401, 136 N.W. 956, where a court of probate attempted to exercise civil jurisdiction.

The Court held in the last cited case that whether a judgment is jurisdictionally bad for judicial error instead of for excess of power, turns on whether the court had jurisdiction of such subjects as the one deliberated upon.

So that when, as in this case, a judge situated as was the respondent Luce, has acquired full jurisdiction of the cause, any judgment rendered in the exercise of that jurisdiction even if clearly erroneous, can only be tested by appeal. This is true even though the error was committed as is claimed here, by retaining jurisdiction after jurisdiction had been acquired by another tribunal.

It is not for this court to decide in passing upon this phase of the case, whether the District Court acquired jurisdiction upon the reinstatement of the appellant's petition. It is rather for this court to decide whether the County Court of Walworth County had jurisdiction of the person of the respondent and the subject matter of the action prior to the time of reinstatement of the petition.

The appellant admits by allegations in his complaint that notice of the proceedings complained of were duly served upon him and that he had due notice of the pendency and maintenance of such proceedings. Both

the order confirming the sale and the order granting the writ of assistance were appealable orders.

If the appellant felt that he had been aggrieved by either of those orders, or that the orders were issued without authority, or contrary to law, it was his right and his duty to appeal therefrom to the Supreme Court of the State of Wisconsin within the time fixed by the Statutes of that State.

Or, if the appellant believed, as he alleges in his complaint, that the exclusive jurisdiction of the appellant's property, real and personal, was vested in the United States District Court, or that the jurisdiction of the state court previously acquired had been terminated or superseded by the Federal Court, the burden rested upon him to assert those rights promptly and expeditiously. Upon him was the burden to make due application to the Federal Court for a judicial stay enjoining the state court from exercising any further jurisdiction.

Instead of so doing, it affirmatively appears that the appellant, with full knowledge that an application for confirmation of sale had been made, with full knowledge that application for a writ of assistance had been made, and in spite of the fact that possession of the real estate in question had been delivered to the purchaser on March 12, 1936, stood idly by and in no wise questioned the jurisdiction of the state court until he instituted this suit in September, 1937, approximately two years after the issuance of the order confirming the sheriff's sale.

Despite the fact that three courses were open to him, to-wit: 1st, an appeal from the orders of the state court; 2nd, an application for a stay of proceedings in the state court, and 3rd, an application for a stay of proceed-

ings in the Federal Court, none of these were pursued, as the complaint affirmatively demonstrates.

Since no appeal was taken in the foreclosure proceedings in the state court and no judicial stay procured in either court, the orders of the Walworth County Court confirming the sale and issuing the writ of assistance are valid and binding, even if erroneous, and are not subject to collateral attack.

C. Authorities cited by appellant claiming County Court orders void are inapplicable.

Counsel cite *Wright v. Union Central Life*, 304 U.S. 502 as holding that the proceedings had after the reinstatement of the petition in this case are a nullity and void. That case involved a direct appeal. Thus, the issue might have been the same, assuming other elements were in common, had there been a direct appeal from the order confirming the sale. But, it is quite another matter to say that it was wholly void so that it could be attacked collaterally. The *Wright* case and the other cases involving a direct appeal are not applicable.

Nor do we have any quarrel with their authority to the effect that acts done by a court which has no jurisdiction either over the person, the cause, or the process, are *Coram non judice*. As previously pointed out herein, the County Court had acquired jurisdiction of the person and of the cause by the institution of foreclosure proceedings in due course. Therefore, these authorities are inapplicable. The County Court was then called upon to determine whether it had jurisdiction to confirm. Necessarily, "Jurisdiction is the power to decide wrongly as well as rightly."

This is quite a different situation than referred to by counsel where there is a complete absence of jurisdiction such as, for instance, if a probate court should proceed to entertain an application for a criminal warrant.

V.

THE FILING OF THE AMENDED PETITION UNDER SECTION 75 DID NOT EFFECT AN AUTOMATIC STAY OF FORECLOSURE PROCEEDINGS PENDING IN STATE COURT AND COUNTY COURT HAD JURISDICTION TO CONFIRM SALE PREVIOUSLY HELD

A. Act at most subjects farmer and property not in custody or control of some other court to exclusive federal jurisdiction.

It is contended by the appellant that the mere filing of a petition in the Federal Court automatically stayed all proceedings then pending in the State Court. We are not unmindful of the fact that some of the Federal Circuits have so held. In others it has been held that the proceedings in the State Court are stayed only when the proper order is issued in the Federal Court. Some circuits have held that such an order can be issued summarily. *In re Price*, 16 Fed. Supp. 836. The question has generally arisen on the application for a stay order and it is held that the Bankruptcy Court has that power, except where a homestead is involved which creditors could not reach in any event, and where the State Court proceedings had been begun more than four months previous. 6 *Am. Jur.* 722. It has been a question of an attempt to commence proceedings in a State Court after the petition has been filed. This

question was not involved in *Wright v. Vinton Branch Mountain Trust Co.*, 300 U. S. 440, or in *Wright v. Union Central Life Ins. Co.*, 304 U. S. 502. With reference to *Adair v. Bank of America National Trust & Savings Association*, 303 U. S. 350, the Supreme Court of Wisconsin said: (Transcript 15)

> "Nor do we find anything in the case of Adair v. Bank of America National Trust and Savings Association, — U. S. —, decided February 28, 1938, to the contrary. While it is stated in that opinion that Sec. 75 provides that the filing of the petition shall effect a stay, the cases cited in support of the proposition are cases relating to the power of a court of bankruptcy to stay proceedings and it is held that courts of bankruptcy have that power."

We submit that this Court has not specifically passed upon the question.

It is our contention that Section 75 provides for a judicial stay when the proper facts are made to appear and that the filing of the petition does not automatically stay proceedings already instituted and pending in the State Court.

We respectfully submit that Section 75 is a part of the Bankruptcy Act and that its provisions must be construed in the light of established principles and adjudications laid down by the courts in the past.

We are not unmindful of that portion of Subsection N of Section 75 of the Bankruptcy Act which reads as follows:

> "The filing of a petition shall immediately subject the farmer and all his property, wherever located, for the purpose of this section to the exclusive jurisdiction of the Court * * * "

But from a reading of the entire section it is clear that it was not intended that the mere filing of a petition would act as a stay of proceedings then pending in a State Court.

Subsection S(2) U.S.C.A. Title 11, Sec. 203, provides as follows:

> "When the conditions set forth in this section have been complied with, the Court shall stay all judicial or official proceedings in any court for a period of three years."

Had Congress intended that the Bankruptcy Court was to be vested with exclusive jurisdiction upon the mere filing of a petition, and that such filing amounted to a stay of all other proceedings instanter and without any other affirmative action, no reason would exist for a stay at a subsequent stage in the proceedings.

It has been stated in dealing with the bankruptcy law that the filing of a petition in bankruptcy operates to invest the bankruptcy court with exclusive jurisdiction over controversies relating to property in the possession of the bankrupt at the time of bankruptcy of which he claims the ownership. *Ex Parte Baldwin,* 291 U. S. 610; 78 L. Ed. 1020, 54 S. Ct. 551, 6 Am. Jur. P. 531, Par, 25. Yet this seemingly decisive language has been modified by later decisions of this Court.

> "The doctrine has been limited by later decisions of the Supreme Court (U.S.) in which it is adjudged applicable only to parties who have no substantial claim of lien upon, or title to, the property of the bankrupt and not to those who have such claims of existing liens or titles when the petition in bankruptcy is filed. *In reality, the filing is neither a caveat nor an attachment; it creates no lien.* It may, perhaps, better be said that the filing

of the petition *is an assertion of jurisdiction* with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. *Actual possession* by the bankruptcy court is an indispensable condition of its exclusive jurisdiction." (Italics ours) Vol. 6, Am. Jur. P. 532.

To the same effect is *Straton v. New,* 283 U. S. 318, 75 L. Ed. 1060, 51 S. Ct. 465, in which Mr. Justice Roberts said

> *"The filing of the petition is an assertion of jurisdiction* with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate."

And in *6 Am. Jur.* at P. 535 it is said:

> *"Bankruptcy proceedings do not, merely by virtue of their maintenance, terminate an action already pending in a State Court,* to which the bankrupt is a party or deprive the Court of jurisdiction in such case especially where jurisdiction of both the subject matter and the parties has been acquired by the State Court before the filing of the petition in bankruptcy."

It is clear therefore that the term "exclusive" as it has been applied in the administration of the bankruptcy law, has not been construed as divesting the State Court of jurisdiction acquired prior to the filing of the petition in bankruptcy but only as an assertion of jurisdiction.

That this is the true intent of Section 75, we submit, is further demonstrated by the last sentence of Subsection N of that Section, which reads as follows:

> "In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the courts, the title, powers, and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with re-

spect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition, asking to be adjudged a bankrupt, was filed with the clerk of court or left with the conciliation commissioner for the purpose of forwarding same to the clerk of court."

There are urgent reasons why a bankrupt desiring a stay of proceedings in the State Court should be required to ask for and obtain a stay in either the Federal or State Court. No judicial problem is more vexatious, nor more difficult of discernment than questions of jurisdiction particularly between the State and Federal Courts. Does not the orderly administration of justice require that before a State Court is ousted of jurisdiction by a Federal Court or vice-versa, that a magistrate make and enter an order to that effect and cause it to be served upon all interested persons?

Property rights and titles to lands are invariably involved in proceedings under the bankruptcy act. If state courts are automatically divested of jurisdiction by the mere filing of a petition in bankruptcy uncertainty and inextricable confusion must inevitably follow.

In this connection Mr. Chief Justice Rosenberry, speaking for the Supreme Court of the State of Wisconsin (Transcript page 15) said:

"It may be conceded that the filing of the petition in the federal court created certain rights which the plaintiff in this action might have asserted either in the federal court or in the state court. However, the plaintiff failed to assert such rights either in the federal or state court as has already been stated. All that this court is called upon to do is to determine whether or not the order of confirmation was valid and that depends upon whether the county court for

Walworth county had jurisdiction to make the determination. If it should be held that the mere filing of the petition divested the state court of jurisdiction the whole matter would be thrown into inextricable confusion. No one would know whether a judgment of foreclosure of a state court with an order confirming a sale thereunder was valid or void until a search had been made of the records of the federal courts.

We need not consider nor discuss the question whether the congress has power to divest the jurisdiction of a state court which has once attached. That question is not presented by this record. It would seem from a consideration of Sec. 75 as amended that the filing of the petition automatically operated to extend the period of redemption. It is possible that that state of facts if made to appear would make the order of the trial court erroneous but the order would be within the power of the court to make. No appeal having been taken, no showing having been made in the state court, an order of sale having been confirmed and the purchaser put in possession, the plaintiff is in no position to claim that the order of the circuit court is void.

We adhere to our former determination that the provisions of Sec. 75 were not intended to provide for a statutory stay but to create rights when properly asserted are grounds for a judicial stay." (fols. 39-73).

(Note: The words "circuit court" in the last sentence are obviously in error. The order referred to by Chief Justice Rosenberry was issued by the County Court of Walworth County, a court having concurrent powers with the Circuit Court.)

We submit a study of the entire act, at most, leads to the construction that the filing of the petition subjects the farmer and all his property, *not in custody or control of some other court,* to the exclusive jurisdiction of the bankruptcy court.

B. The cases cited by the appellants in support of their contention that Section 75 is self-executing do not apply.

At Pages 10, 11 and 13 of the appellants' brief, there will be found a number of United States Supreme Court decisions in support of appellants' contention that the statute in question is self-executing, and in support of that contention assert that the adjudications relating to the general bankruptcy law must control. It is true, as we pointed out elsewhere in our brief, that the Supreme Court of the United States has always held that Bankruptcy Courts have exclusive jurisdiction of the property of the bankrupt from the time of filing the petition.

We are also familiar with the rule oft-times repeated, that "the filing of the petition is a caveat to all the world and in fact an attachment and an injunction."

But that case and the other cases cited by the appellants are in support of the proposition that the Federal Court may, by injunction either summarily or upon notice, restrain a state court from exercising jurisdiction after the filing of the petition in the federal court. In the case of *May v. Henderson,* 268 U. S. 111, 69 L. Ed. 870, this court said:

> "In consequence any person acquiring an interest in property of the bankrupt after the filing of a petition with notice of it, may be directed to surrender the property thus acquired by summary order of the bankruptcy court."

And in *Isaacs v. Hobbs Tie & Timber Co.*, 282 U. S. 734, 75 L. Ed. 645, the Court after repeating the "exclusive jurisdiction" rule and that exercise of that jurisdiction forbids interference by state courts, also said "as mortgaged property ordinarily lies within the district in

which the bankruptcy court sits, and the mortgagee can consequently be served with its process, the procedure usually followed is for that court to restrain the institution of foreclosure proceedings in any other. Where the land lies outside the limits of the district in which the bankruptcy court sits, ancillary proceedings may be instituted in the District Court of the United States for the district in which the land is, and an injunction against foreclosure issued by the court of ancillary jurisdiction."

And in *Gross v. Irving Trust Company,* 289 U. S. 342, 77 L. Ed. 1243, cited at page 10 of the appellants' brief, in a case involving the question of whether or not a state court had the power to fix compensation of state receivers and their counsel after bankruptcy in the Federal Court had intervened, this Court held that bankruptcy courts have exclusive jurisdiction and that its possession and control cannot be affected by other proceedings, but the court further said:

> "Nevertheless, due regard for comity, which means, in this connection, no more than judicial courtesy between the courts undertaking to deal with the same matter—would suggest that ordinarily the trustee in bankruptcy might well be instructed by the bankruptcy court, before taking final action, to request the state court to recognize the exclusive jurisdiction of the former and set aside any orders already made conflicting therewith, as was done with good results in the case of Re Diamond, supra ((C. C. A. 6th) 259 Fed. pp. 72, 75, 44 Am. Bankr. Rep. 268).

And in *Acme Harvester Company v. Beekman,* 222 U. S. 300, 56 L. Ed. 209, cited by appellants at page 13 of their brief, the question involved was whether or not the Federal Court had the power to restrain a state court from pursuing an action in debt instituted after the fil-

ing of a petition in bankruptcy. This court, in discussing the rule, said:

> "The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate."

We respectfully submit therefore that the authorities cited by the appellants do not support their position and that the general rule in bankruptcy matters is that the filing of a petition in a bankruptcy court does not ordinarily and without notice suspend the power of all other courts to act, but merely is an assertion by the Federal Court of its jurisdiction, with a view to a determination of the status of the bankrupt and a settlement and distribution of his estate. The assertion of jurisdiction we contend, must be exercised by an injunctional order.

VI.

FULL FAITH AND CREDIT CLAUSE OF FEDERAL CONSTITUTION WOULD BE VIOLATED IF COURT REFUSED TO RECOGNIZE VALIDITY OF FORECLOSURE SALE AND PROCEEDINGS IN STATE COURT

Sec. 1 of Article 4 of the United States Constitution provides:

> "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."

This necessarily requires that the State Court has authority to proceed to confirm a foreclosure sale held pursuant to a valid judgment of foreclosure.

The County Court of Walworth County decided that the Frazier-Lemke Act was not applicable to the case before it where the foreclosure sale had been had and necessarily decided that the filing of the amended petition in the Bankruptcy Court, without a specific stay order, did not stay the County Court or divest it of jurisdiction to confirm the sale. The Supreme Court of Wisconsin affirmed that decision and said: (R. 15)

> "It is possible that that state of facts if made to appear would make the order of the trial court erroneous but the order would be within the power of the court to make. No appeal having been taken, no showing having been made in the state court, an order of sale having been confirmed and the purchaser put in possession, the plaintiff is in no position to claim that the order of the circuit (county) court is void."

The Supreme Court of Wisconsin has, therefore, decided that even if the decision by Judge Luce was erroneous, that it was nevertheless valid as within his jurisdiction to make and binding since it had not been subjected to direct attack by appeal.

This is an independent, non-Federal ground, amply adequate to support the State Court decision and is not subject to review by appeal to this Court. The Full Faith and Credit Clause requires that this Court give full faith and credit to the decision of the Supreme Court of Wisconsin in so far as it is based upon the non-Federal ground.

It follows, likewise, that the decision of the County Court of Walworth County in the foreclosure suit, not having been appealed from, is valid and binding and entitled to full faith and credit.

This Court has held that under the Constitution, Federal Courts are just as much bound to honor judgments of a State Court as are courts of any state foreign thereto. *Cooper vs. Newell*, 173 U. S. 555, 43 L. Ed. 808.

VII.

THE COMPLAINT AFFIRMATIVELY DISCLOSES A LACK OF GOOD FAITH ON THE PART OF THE APPELLANT, OR A COMPLIANCE WITH THE PROVISIONS OF SECTION 75

The complaint alleges that the original petition was filed by the appellant in the District Court of the United States for the Eastern District of Wisconsin on the 2nd day of October, 1934. It was dismissed on June 27th, 1935, and subsequently was reinstated on the 6th day of September, 1935.

The complaint however is barren of any allegation that a plan of composition was submitted, or that it was accepted or denied, or any report submitted by the Commissioner. The complaint is likewise barren of any allegation that the appellant has been adjudicated a bankrupt in accordance with Section 75(s).

Although nearly eighteen months elapsed from the date the original petition was filed before his possession of the real estate was disturbed, and nearly three years elapsed from the date of filing and the commencement of this action, the complaint shows that the appellant did nothing to comply with the terms of the Act.

We submit therefore that he must be deemed to have abandoned the proceedings in the Federal Court and to

have waived and surrendered any rights the filing of the petition may have invested in him.

The law in question, the Frazier-Lemke Act, was not enacted by the Congress of the United States for the mere purpose of providing a means by which a debtor unwilling, or unable to meet his obligations could prevent his creditors from pursuing their legal remedies. It required the debtor to seasonably take a definite course of action to the end that one or two results should be reached, either a composition, or, if that was impossible, an adjudication in bankruptcy.

It is stated in *Vol. 8, C. J. S.*, Page 1750, Par. 808, that:

> "One seeking benefits provided by the Act, after initiating the procedure, must carry the burden of pursuing the various steps provided diligently, honestly, in good faith and without unnecessary delay."

The Federal Courts in discussing Section 75 have uniformly held that:

> "The submission of an equitable, feasible and good-faith proposal of compromise or extension on the part of the debtor is a condition precedent to his right to proceed further under the provision of Section 75 of the Bankruptcy Act."
>
> *In re Alatalo*, 26 F. Supp. 276.

And in *Baxter v. Savings Bank of Utica*, N. Y. 92, Fed. (2nd) 404, the Court said:

> "A good-faith effort to compromise with creditors is a prerequisite to extension relief in agricultural composition proceedings."

To the same effect is the case of *Pearce v. Coller*, 92 F. (2nd) 237, where it was held that a farm debtor who did not comply with statutory requirements relative to composition and plan of extension, was not entitled to relief under the Act.

And in *re Henderson*, 100 F. (2nd) 820, it was said:

> "A proceeding for composition or extension of debts may not be converted into a sham for the purpose of gaining whatever the debtor wishes by way of procedural delays and hindrances to creditors where no legitimate purpose of the act authorizing such proceedings will be served."

The complaint, it appears to us, affirmatively demonstrates a complete and absolute lack of "good faith" on the part of the appellant and the complaint is rendered demurrable for that reason in addition to the other grounds relied upon by the appellant.

VIII.

DEMURRERS WERE CORRECTLY SUSTAINED AS TO SECOND AND THIRD CAUSES OF ACTION AS ALLEGATIONS ARE INSUFFICIENT UNDER WISCONSIN LAW

A. The second cause of action fails to state a cause of action against the defendants Judge Luce and Henry and Helen Feuerstein because it fails to allege that they were present or that they aided or abetted the sheriff, and because it fails to allege that they intended to cause the sheriff to commit an assault and battery.

With reference to the second cause of action, in paragraph two, it is alleged that the assault and battery by the defendant George O'Brien "was under the direction of the other defendants in this action." This, standing alone, might be sufficient to bind the defendants Luce and Feuersteins, but, when taken in connection with the rest of the sentence, namely—"who wrongfully and un-

lawfully directed the said George O'Brien to make such entry and wrongfully remove the plaintiff and his family therefrom," it is insufficient, for such allegation reasonably implies only that the other defendants directed the Sheriff to make entry and remove the plaintiff, not that they assault and beat him.

> "In order to render one liable as a principal for the assault and battery committed by another, it is necessary that the principal must have *intended* by his statements to the employee to cause him to commit an assault and battery."

Krudwig vs. Koepke, 223 Wis. 244.

Certainly no such intention can be spelled from the language used. It is not alleged that the defendants Luce and Henry and Helen Feuerstein were present or that they aided or abetted the Sheriff either by word or deed. That Judge Luce signed an order directing the Clerk to issue a Writ of Assistance or that the Feuersteins petitioned for such an order, does not render them accountable for the acts of the officer in enforcing the same. *5 C. J. 626.*

B. The language of the third cause of action is wholly insufficient to state a cause of action for false imprisonment, as it fails to allege in what respect the restraint was illegal.

1. The allegations in the third cause of action fail to connect Honorable Roscoe R. Luce and Henry and Helen Feuerstein with the alleged false imprisonment.

A reading of the allegations of the third cause of action shows that no offense is charged against the defendants,

Roscoe R. Luce and Henry and Helen Feuerstein. They are not connected in any way or charged with any responsibility for the alleged false imprisonment of the appellant by the defendant, George O'Brien. The only language in this cause of action which could in any way be construed to connect the defendants, Luce and Feuerstein, with a charge of false imprisonment is by the first paragraph which incorporates paragraph 15 of the first cause of action; but this does not in any way charge that the defendants, Luce and Feuersteins, conspired with the defendant, O'Brien, to *imprison* the appellant but merely that they acted in collusion with him to effect a plan or scheme to acquire possession of his farm. This certainly does not go so far as to charge them either as principles or accessories to the alleged false imprisonment.

2. The third cause of action fails to allege facts showing that the imprisonment was extra judicial or without legal process.

A complaint for false imprisonment should allege that the arrest or imprisonment was caused or procured by the defendant; it should allege facts showing that the arrest was without probable cause and unlawful if made without process; and that the plaintiff was privileged or exempt from arrest if the arrest was made upon process regular on its face; or that the process was void for lack of jurisdiction or other cause.

2 Winslow's Forms, Pleading and Practice, Third Edition, Par. 2962.

The complaint does not disclose whether the arrest was with or without process.

By the demurrer, the defendants admit that appellant was restrained. They do not admit the legal conclusion

"that he was wrongfully and unlawfully restrained." From all that appears the appellant may have been arrested pursuant to valid process; or he may have been arrested legally without process. The facts must be alleged, not conclusions of law.

> "Where the facts alleged do not show that the acts complained of were unlawful or wrongful, they are not shown to be so by a mere allegation that they are wrongful and unlawful."
>
> "Where the alleged wrongful detention is pursuant to process, facts must be stated showing that it is extra-judicial or without jurisdiction. It is insufficient to allege merely that the court or defendant had no jurisdiction."
>
> *25 C. J. 533.*
>
> "The complaint should allege facts showing that the imprisonment was extra-judicial or without legal process."
>
> *King vs. Johnson,* 81 Wis. 578.
> *Murphy vs. Martin,* 58 Wis. 276.

The imprisonment is not necessarily false as it does not properly appear that the arrest, if without process, was under circumstances making the arrest false, or that if it was made pursuant to process, that the same was extra judicial.

As a matter of fact, though the plaintiff did not see fit to allege it, the plaintiff was arrested for resisting an officer. A warrant was regularly issued upon a written complaint and the plaintiff appeared before Roscoe R. Luce, as County Judge, and entered a plea of *guilty* and was sentenced therefor.

As the plaintiff has failed to allege the ultimate facts showing that the complaint and warrant were void and

proceedings illegal (or that the arrest was made under circumstances where the same was not legally permitted without process) we submit that the third cause of action is fatally defective.

CONCLUSION

It should not be lost sight of that this is not a proceeding under the Frazier-Lemke Act. Counsel for the appellant seemingly treat it as such as they do not advert to the other issues necessarily involved. They conclude their brief with a statement that the decisions of the Supreme Court of Wisconsin should be reversed and the causes remanded with instructions that the State Court allow proceedings in accordance with the provisions of Sec. 75 of the Bankruptcy Act. In behalf of the respondents, Judge Roscoe R. Luce, and Sheriff George O'Brien, we would have no quarrel with that prayer. It would seem that so far as this case is concerned that counsel have failed to properly analyze the legal remedy of their client assuming that the principal contention outlined in their brief is correct.

This is a suit for damages against the Judge, the Sheriff, and the litigants in tort for trespass, assault and battery and unlawful imprisonment. It is one thing to say that the stay provided in Sec. 75 is self-executing and that the County Court was in error in confirming the sale. It is quite another to say that the Judge and the Sheriff and even the litigants are liable in tort for damages by reason thereof.

On the motion to dismiss or, in the alternative, to affirm for want of a substantial Federal question, we submit that there are ample, independent and adequate non-

Federal grounds in the record in support of the State Court decision, and that the motions should be granted.

If they be denied, we contend that the judgment should be affirmed for the following reasons:

1. A. The respondent, Judge Luce, acted in his judicial capacity and is immune from liability even if error were committed, for he was confronted with facts which had legal value or *color* of legal value upon the question of his jurisdiction.

B. The respondent, Sheriff George O'Brien, is immune from liability in executing the Writ of Assistance under Wisconsin law as it was fair on its face.

C. No liability can attach in tort to the respondents, Feuerstein, under Wisconsin law.

2. This suit for damages in the Circuit Court of Walworth County is a collateral attack upon the orders of the County Court of Walworth County and since there was no stay or direct appeal, it cannot be attacked collaterally.

3. The County Court of Walworth County had jurisdiction to enforce its foreclosure decree and confirm the sale where the sale was had and deed delivered prior to the reinstatement of appellant's petition.

4. The filing under Sec. 75 is not an automatic stay but at most subjects the debtor and all of his property not in the custody or control of some other court, to the exclusive jurisdiction of the Bankruptcy Court and a specific stay order is required as to property in the control of such State Court.

5. The Full Faith and Credit Clause requires that this Court recognize the validity of the decision of the

State Supreme Court in so far as it is based upon non-Federal grounds and, likewise, the proceedings in the County Court since no direct appeal therefrom was taken.

6. Because the complaint shows that the appellant has failed to comply with the provisions of Sec. 75 and must be deemed to have abandoned the same.

7. Because the demurrers as to the second cause of action as to the respondents Luce and Feuerstein were correctly sustained on questions of pleading under Wisconsin law and because the demurrer to the third cause of action was correctly sustained as to all respondents for the reason that it was an insufficient pleading under Wisconsin law.

Most respectfully submitted,

ARTHUR T. THORSON, Elkhorn, Wis.

J. ARTHUR MORAN, Delavan, Wis.

Counsel for Respondents.

APPENDIX I

LAWS OF WISCONSIN, 1907.

No. 257, S. Published June 20, 1907.

CHAPTER 234.

AN ACT to confer civil and criminal jurisdiction on the county court of Walworth County.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

Concurrent with circuit court for cases not over $25,000. SECTION 1. There is hereby conferred on the county court of Walworth county, jurisdiction in all civil actions and proceedings in law and in equity, concurrent with and equal with the jurisdiction of the circuit court in said county, for all claims, demands and sums and to and concerning all property, not exceeding the sum or value of twenty-five thousand dollars; provided, that said county court shall have jurisdiction in all actions in said county for the foreclosure of mortgages and mechanic liens, in which the amount claimed does not exceed the sum above mentioned, although the property to be affected by the judgment exceeds the sum of twenty-five thousand dollars in value; and of all actions for divorce or for affirmance or annulment of marriage contracts; and all actions for removing clouds and quieting title to real estate and all actions for partition of real estate; and in all bastardy actions and in all criminal cases except murder, manslaughter and homicide; and to the amount and within the limits aforesaid the said county court shall be a court of general jurisdiction, with the same power and jurisdiction in all civil and criminal actions and proceedings, and including the power of review of records on certiorari, discharging mortgages of record,

and such other special powers as are now or may hereafter be conferred by the statute upon the circuit court, coming within the above limitations, as belong to and are exercised by the circuit court in and for said county.

Writs and legal process. SECTION 4. The said county court, within the limits aforesaid, shall be a court of record, with a clerk and seal, and shall have full power and authority to issue all writs and legal process, proper and necessary to carry into effect the jurisdiction conferred by this act and the laws of this state, and to carry out such jurisdiction shall have and exercise all powers now possessed, or which may hereafter be possessed by the circuit courts of this state, and the same proceedings shall be had by the parties to procure such writs and process as in circuit courts and such writs and process shall be issued, executed and returned in the same manner and with like effect as in the circuit courts.

Execution: circuit court powers conferred. SECTION 8. All judgments, orders and decrees, made and entered in and by said county court, shall have the same force, effect and lien, and be executed and carried into effect and enforced, as judgments, orders and decrees, made and entered in the circuit court, and all the remedies given, and proceedings provided for the collection and enforcement of the judgments, orders and decrees of the circuit court, shall apply to and be exercised by and pertain to said county court.

Supreme court's review same as for circuit court. SECTION 9. All orders and judgments of said county court may be reviewed by the supreme court in the same manner and with like effect that judgments and orders of the circuit court may be reviewed; and the supreme court shall have the same power and jurisdiction over

such actions, proceedings, orders and judgments as it has over actions, proceedings, orders and judgments in the circuit court of said county, and the parties shall have the same rights to writs of error and appeal from said county court to the supreme court of this state as now, or may hereafter be, allowed by law from circuit courts of this state and may demand and shall be entitled to receive from the judge of said county court a bill of exceptions or case and have the same settled in the same manner and under the same restrictions as in the circuit court and the same shall be heard and settled within the same time as now required or may hereafter be required in the circuit court, by law or the rules and practice of said circuit court or of the said county court relative thereto.

Circuit court procedure unless inapplicable. SECTION 28. The general provisions of the statutes of Wisconsin, and all the general laws which may at any time be in force relative to circuit courts, and actions and proceedings therein, in civil and criminal cases, shall apply also to said county court, unless inapplicable, and except as otherwise provided in this act; and the rules of practice prescribed or which may hereafter be prescribed by the justices of the Supreme Court for circuit court, shall, unless inapplicable, be in force in said county court, and the judge of said county court shall have power to punish for contempt in the same manner that the judges of circuit courts are or may be authorized by law to punish for contempts; and said county court shall have power to make and enforce such other rules of practice as may be necessary.

Approved June 18, 1907.

(In effect July 1, 1907.)

(Other sections of the Act are omitted as not pertinent.)

SUPREME COURT OF THE UNITED STATES.

Nos. 120, 121.—October Term, 1939.

120	Ernest Newton Kalb and Margaret Kalb, his Wife, Appellants, *vs.* Henry Feuerstein and Helen Feuerstein, his Wife.	Appeals from the Supreme Court of the State of Wisconsin.
121	Ernest Newton Kalb, Appellant, *vs.* Roscoe R. Luce, Henry Feuerstein, Helen Feuerstein and George O'Brien.	

[January 2, 1940.]

Mr. Justice Black delivered the opinion of the Court.

Appellants are farmers. Two of appellees, as mortgagees, began foreclosure on appellants' farm[1] March 7, 1933, in the Walworth (Wisconsin) County Court; judgment of foreclosure was entered April 21, 1933; July 20, 1935, the sheriff sold the property under the judgment; September 16, 1935, while appellant Ernest Newton Kalb had duly pending[2] in the bankruptcy court a petition for composition and extension of time to pay his debts under section 75 of the Bankruptcy Act (Frazier-Lemke Act),[3] the Walworth County Court granted the mortgagees' motion for confirmation of the sheriff's sale; no stay of the foreclosure or of the subsequent action to enforce it was ever sought or granted in the State or bankruptcy court; December 16, 1935, the mortgagees, who had purchased at the sheriff's sale, obtained a writ of assistance from the

[1] In both No. 120 and No. 121, the complaints alleged that appellant Kalb and his wife executed the mortgage. In No. 120 both Kalb and his wife were alleged to be owners of the farm; while in No. 121, appellant Kalb was alleged to be the owner.

[2] October 2, 1934, the petition was filed and approved. June 27, 1935, the petition was dismissed, but September 6, 1935, it was reinstated and the order of dismissal was vacated pursuant to the second Frazier-Lemke Act, 11 U. S. C. 203, § 5.

[3] 11 U. S. C. 203.

State court; and March 12, 1936, the sheriff executed the writ by ejecting appellants and their family from the mortgaged farm.

The questions in both No. 120 and No. 121 are whether the Wisconsin County Court had jurisdiction, while the petition under the Frazier-Lemke Act was pending in the bankruptcy court, to confirm the sheriff's sale and order appellants dispossessed, and, if it did not, whether its action in the absence of direct appeal is subject to collateral attack.

No. 120. After ejection from their farm, appellants brought an action in equity in the Circuit Court of Walworth County, Wisconsin, against the mortgagees who had purchased at the sheriff's sale, for restoration of possession, for cancellation of the sheriff's deed and for removal of the mortgagees from the farm. Demurrer was sustained for failure to state a cause of action and the complaint was dismissed. The Supreme Court of Wisconsin affirmed.[4]

No. 121 is a suit at law in the State court by appellant Ernest Newton Kalb against the mortgagees, the sheriff and the County Court judge who confirmed the foreclosure sale and issued the writ of assistance. Damages are sought for conspiracy to deprive appellant of possession, for assault and battery, and for false imprisonment. As in No. 120, demurrer was sustained, and the Supreme Court of Wisconsin affirmed.[5]

In its first opinion the Supreme Court of Wisconsin said: "It is the contention of the plaintiff [mortgagor] that this statute is self executing,—that is, that it requires no application to the state or federal court in which foreclosure proceedings are pending for a stay; in other words, that it provides for a statutory and not for a judicial stay. Plaintiff's claims under the Bankruptcy Act present a question which clearly arises under the laws of the United States and therefore present a federal question upon which determination of the federal courts is controlling." Addressing itself solely to this Federal question of construing the Frazier-Lemke Act, the Wisconsin court decided that the Federal Act did not itself as an

[4] — Wis. —.

[5] Demurrer to one count against the sheriff for assault and battery was overruled, but the Supreme Court of Wisconsin reversed as to this count. The opinion of the court upholding the demurrer appears in Kalb *v.* Luce, 228 Wisconsin 519, 279 N. W. 685. Appeal to this Court was dismissed because no final judgment had been entered. 305 U. S. 566. Upon remand the State Circuit Court dismissed, the Supreme Court of Wisconsin affirmed, "for the reasons . . . stated" in its opinion in Kalb *v.* Luce, *supra*, — Wis. —, and the appeals here are from the judgments of dismissal, — U. S. —.

automatic statutory stay terminate the State court's jurisdiction when the farmer filed his petition in the bankruptcy court. Since there had been no judicial stay, it held that the confirmation of sale and writ of assistance were not in violation of the Act.

Appellees insist, however, that the Wisconsin court on rehearing rested its judgment on an adequate non-federal ground. If that were the fact, we would not, under accepted practice, reach the State court's construction of the Federal statute.[6] The statement on rehearing relied on as constituting the non-federal ground was: "We need not consider nor discuss the question whether the congress has power to divest the jurisdiction of a state court which has once attached. That question is not presented by this record. It would seem from a consideration of sec. 75 as amended that the filing of the petition automatically operated to extend the period of redemption. It is possible that that state of facts if made to appear would make the order of the trial court erroneous but the order would be within the power of the court to make. No appeal having been taken, no showing having been made in the state court, an order of sale having been confirmed and the purchaser put in possession, the plaintiff is in no position to claim that the order of the circuit court is void."

But if appellants are right in their contention that the Federal Act of itself, from the moment the petition was filed and so long as it remained pending, operated, in the absence of the bankruptcy court's consent, to oust the jurisdiction of the State court so as to stay its power to proceed with foreclosure, to confirm a sale, and to issue an order ejecting appellants from their farm, the action of the Walworth County Court was not merely erroneous but was beyond its power, void, and subject to collateral attack. And the determination whether the Act did so operate is a construction of that Act and a Federal question.

It is generally true that a judgment by a court of competent jurisdiction bears a presumption of regularity and is not thereafter subject to collateral attack.[7] But Congress, because its power over the subject of bankruptcy is plenary, may by specific bankruptcy

[6] Honeyman v. Hanan, 300 U. S. 14, 18; Lynch v. New York ex rel. Pierson, 293 U S. 52, 54; Enterprise Irrigation District v. Farmers Mutual Canal Co., 243 U. S. 157, 164; Hammond v. Johnson, 142 U. S. 73.

[7] No. 122, Chicot County Drainage District v. The Baxter State Bank, this day decided; Stoll v. Gottlieb, 305 U. S. 165, 171, 172; Dowell v. Applegate, 152 U. S. 327, 340.

legislation create an exception to that principle and render judicial acts taken with respect to the person or property of a debtor whom the bankruptcy law protects nullities and vulnerable collaterally.[8] Although the Walworth County Court had general jurisdiction over foreclosures under the law of Wisconsin,[9] a peremptory prohibition by Congress in the exercise of its supreme power over bankruptcy that no State court have jurisdiction over a petitioning farmer-debtor or his property, would have rendered the confirmation of sale and its enforcement beyond the County Court's power and nullities subject to collateral attack.[10] The States cannot, in the exercise of control over local laws and practice, vest State courts with power to violate the supreme law of the land.[11] The Constitution grants Congress exclusive power to regulate bankruptcy and under this power Congress can limit the jurisdiction which courts, State or Federal, can exercise over the person and property of a debtor who duly invokes the bankruptcy law. If Congress has vested in the bankruptcy courts exclusive jurisdiction over farmer-debtors and their property, and has by its Act withdrawn from all other courts all power under any circumstances to maintain and enforce foreclosure proceedings against them, its Act is the supreme law of the land which all courts—State and Federal—must observe. The wisdom and desirability of an automatic statutory ouster of jurisdiction of all except bankruptcy courts over farmer-debtors and their property were considerations for Congress alone.

We think the language and broad policy of the Frazier-Lemke Act conclusively demonstrate that Congress intended to, and did deprive the Wisconsin County Court of the power and jurisdiction to continue or maintain in any manner the foreclosure proceedings against appellants without the consent after hearing of the bankruptcy court in which the farmer's petition was then pending.[12]

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[8] Vallely v. Northern Fire Ins. Co., 254 U. S. 348, 353-4; and compare Elliott et als. v. The Lessee of Piersol et al., 1 Pet. 328, 340; Williamson et al. v. Berry, 8 How. 495, 540, 541, 542.

[9] Laws of Wisconsin, 1907, Chap. 234.

[10] Vallely v. Northern Fire Ins. Co., *supra*, 355; cf. Taylor v. Sternberg, 293 U. S. 470, 473.

[11] Hines v. Lowrey, 305 U. S. 85, 90, 91; Davis v. Wechsler, 263 U. S. 22, 24.

[12] That a State court before which a proceeding is competently initiated may —by operation of supreme Federal law — lose jurisdiction to proceed to a judgment unassailable on collateral attack is not a concept unknown to our Federal system. See Moore v. Dempsey, 261 U. S. 86. Cf. Johnson v. Zerbst, 304 U. S. 458.

The Act expressly provided:

"(n) The filing of a petition . . . shall immediately subject the farmer and all his property, wherever located, . . . to the exclusive jurisdiction of the court, including . . . the right or the equity of redemption where the period of redemption has not or had not expired, . . . or where the sale has not or had not been confirmed," and "In all cases where, at the time of filing the petition, the period of redemption has or had not expired, . . . or where the sale has not or had not been confirmed, . . . the period of redemption shall be extended or the confirmation of sale withheld for the period necessary for the purpose of carrying out the provisions of this section"; and

"(o) Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings *shall not be instituted*, or if instituted at any time prior to the filing of a petition under this section, *shall not be maintained, in any court or otherwise*, against the farmer or his property, *at any time after the filing* of the petition under this section, and *prior to the confirmation* or other disposition of the composition or extension proposal by the court:

". . . .

"(2) *Proceedings for foreclosure of a mortgage on land*, or for cancellation, rescission, or specific performance of an agreement for sale of land *or for recovery of possession of land;*

". . . .

"(6) Seizure, distress, sale, or other proceedings under an execution or under any lease, lien, chattel mortgage, conditional sale agreement, crop payment agreement, or mortgage.

"(p) *The prohibitions . . . shall apply to all judicial or official proceedings in any court or under the direction of any official*, and *shall apply to all creditors, public or private*, and *to all of the debtor's property, wherever located. All such property shall be* under *the sole jurisdiction and control of the court in bankruptcy*, and subject to the payment of the debtor farmer's creditors, as provided for in section 75 of this Act." (Italics supplied.)

Thus Congress repeatedly stated its unequivocal purpose to prohibit—in the absence of consent by the bankruptcy court in which a distressed farmer has a pending petition—a mortgagee or any court from instituting, or maintaining if already instituted, any proceeding against the farmer to sell under mortgage foreclosure, to confirm such a sale, or to dispossess under it.

This congressional purpose is more apparent in the light of the Frazier-Lemke Act's legislative history. Clarifying and altering the sweeping provisions for exclusive Federal jurisdiction in the

original Act,[13] Congress made several important changes in 1935.[14] It was then that subsection (p) was amended so that the prohibitions in subsection (o) of any steps against a farmer-debtor or his property once his petition is filed were made specifically applicable "to all judicial or official proceedings in any court or under the direction of any official, and . . . . to all creditors, public or private, and to all of the debtor's property, wherever located. All such property shall be under the sole jurisdiction and control of the court in bankruptcy, and subject to the payment of the debtor farmer's creditors, as provided for in Section 75 . . . ."

As stated by the Senate Judiciary Committee in reporting these amendments: " . . . . subsection (n) brings all of the bankrupt's property, wherever located, under the absolute jurisdiction of the bankruptcy court, where it ought to be. Any farmer who takes advantage of this act ought to be willing to surrender all his property to the jurisdiction of the court, for the purpose of paying his debts, and for the sake of uniformity.

" . . . .

"The amendment to subsection (p) further carries out the amendment to subsection (n), and places the sole jurisdiction of the bankrupt's estate and of his obligations all in the bankruptcy court, without exception."[15]

The Congressional purpose is similarly set out in the House Judiciary Committee's Report: "The amendment to subsection (n) in fact construes, interprets, and clarifies both subsections (n) and (o) of section 75. By reading subsections (n) and (o) as now amended in this bill, it becomes clear that it was the intention of Congress when it passed section 75, that the farmer-debtor and all of his property should come under the jurisdiction of the court of bankruptcy, and that the benefits of the act should extend to the farmer, prior to confirmation of sale, during the period of redemption, and during a moratorium; and that no proceedings after the filing of the petition should be instituted, or if instituted prior to the filing of the petition, should not be maintained in any court, or otherwise."[16]

Congress set up in the Act an exclusive and easily accessible statutory means for rehabilitating distressed farmers who, as

[13] 47 Stat. 1470, sec. 75.

[14] 49 Stat. 942, 943.

[15] Senate Report No. 985, 74th Cong., 1st Sess.

[16] House Report No. 1808, 74th Cong., 1st Sess.

victims of a general economic depression, were without means to engage in formal court litigation. To this end, a referee or Conciliation Commissioner was provided for every county in which fifteen prospective farmer-debtors requested an appointment; and express provision was made that these Commissioners should "upon request assist any farmer in preparing and filing a petition under this section and in all matters subsequent thereto arising under this section and farmers shall not be required to be represented by an attorney in any proceeding under this section."[17] In harmony with the general plan of giving the farmer an opportunity for rehabilitation, he was relieved—after filing a petition for composition and extension—of the necessity of litigation elsewhere and its consequent expense. This was accomplished by granting the bankruptcy court exclusive jurisdiction of the petitioning farmer and all his property with complete and self-executing statutory exclusion of all other courts.

The mortgagees who sought to enforce the mortgage after the petition was duly filed in the bankruptcy court, the Walworth County Court that attempted to grant the mortgagees relief, and the sheriff who enforced the court's judgment, were all acting in violation of the controlling Act of Congress. Because that State court had been deprived of all jurisdiction or power to proceed with the foreclosure, the confirmation of the sale, the execution of the sheriff's deed, the writ of assistance, and the ejection of appellants from their property—to the extent based upon the court's actions—were all without authority of law. Individual responsibility for such unlawful acts must be decided according to the law of the State. We therefore express no opinion as to other contentions based upon State law and raised by appellees in support of the judgments of the Supreme Court of Wisconsin.

Congress manifested its intention that the issue of jurisdiction in the foreclosing court need not be contested or even raised by the distressed farmer-debtor. The protection of the farmers was left to the farmers themselves or to the Commissioners who might be laymen, and considerations as to whether the issue of jurisdiction

[17] 47 Stat. 1473(q).

was actually contested in the County Court,[18] or whether it could have been contested,[19] are not applicable where the plenary power of Congress over bankruptcy has been exercised as in this Act.

The judgments in both cases are reversed and the causes are remanded to the Supreme Court of Wisconsin for further proceedings not inconsistent with this opinion.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[18] Stoll v. Gottlieb, *supra.*

[19] Chicot County Drainage District v. The Baxter State Bank, *supra.*